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May/June 1984 AEI Journal on Government and Society

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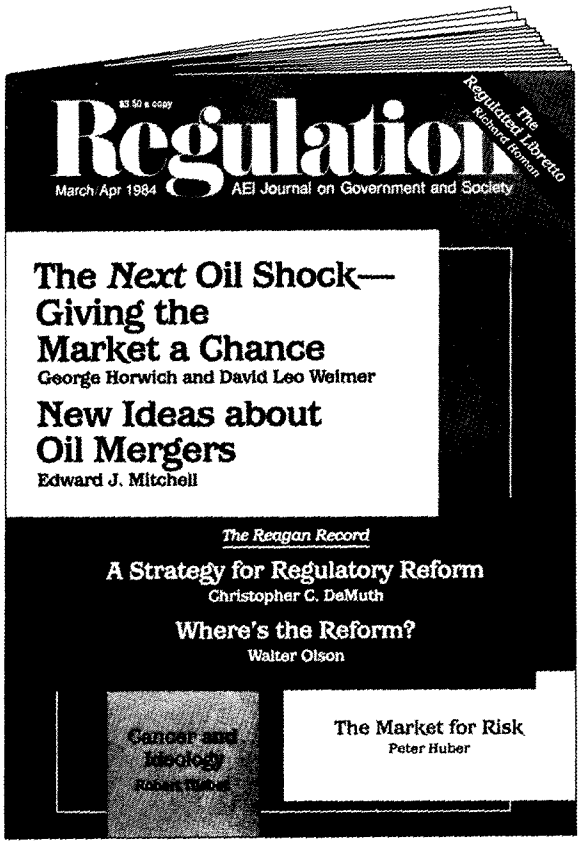

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Regulation

May/June 1984 AEI Journal on Government and Society

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Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

'Round and 'Round on Resale Price Maintenance

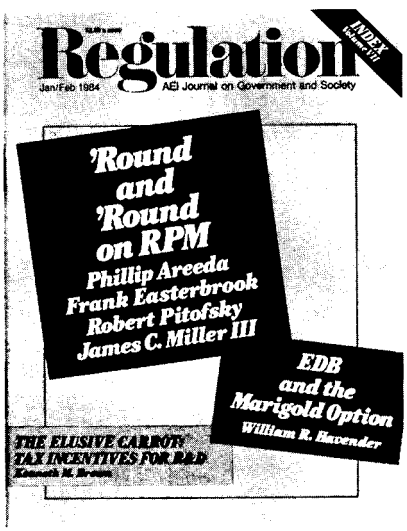
TO THE EDITOR:

Much of the RPM debate centers on the existence or nonexistence of the so-called free rider. This miscreant, according to Frank Easterbrook, is often a "low-service outlet [that] slowly undermines the full-service stores" ("Restricted Dealing Is a Way to Compete," *Regulation*, January/February 1984). Easterbrook warns that a customer "may soak up all that information in the 'full-service' store and then order the [good] from a mail-order outlet." His theory goes on to justify RPM as a way to rid the marketplace of this villain: if higher prices are made mandatory, the free rider cannot undercut the full-service provider.

While Easterbrook's theory has a logical elegance, it has no empirical basis. A recent customer survey detailed in *Computer and Software News* says: "If there is one widely held misconception about the home computer market . . . it is that shoppers exploit the information and sales assistance available at specialty stores before actually buying where the price is right." The *C&SN* survey found that consumers tend to buy in the same type of outlet where they shopped for the computer. This finding was in fact endorsed by a prominent marketing executive of Apple Computer, the firm Easterbrook uses as an example.

Empirical evidence aside, the per se rule makes sound sense: even Easterbrook acknowledges that RPM raises consumer prices, which unquestionably diminishes consumer welfare and adds to inflation. Fixing a retailer's profit margin does not, either logically or practically, lead to better performance.

Nor is RPM needed to accomplish any legitimate goals. Even the advocates of the per se rule can readily admit that it is sometimes important for retailers to provide information to consumers, but manufacturers have many direct ways to accomplish that goal. For example, they may ordinarily give dealers exclusive territories, prohibit them from transshipping goods to unauthorized dealers, and impose various other nonprice restraints on dealers for safety and other service reasons. The only distribution restraint that is never available to a manufacturer under present law is the fixing or maintenance of the resale price by coercion or agreement with distributors. That rule works little hardship.



Easterbrook's theory erroneously equates discounting with poor service. The success of the discount industry, however, is a testimonial that it has offered a desired blend of service and price. It has prospered because it is willing to move a high volume of goods at lower profit margins, while offering those services customers find necessary. Other retailers, opting for lower volume and higher mark-up, have not fared as well in a price-conscious society. The computer survey demonstrates the intelligence of consumers: Consumers who want cachet will shop at a higher-priced store. Consumers who do not wish to purchase frills, carpeted floors, and the attention of well-manicured hovering sales staff will shop elsewhere.

Should antitrust policy be redesigned to protect inefficient merchants against the speculative villain of the marketplace, the "free rider"? I submit not. Instead, the phantom free rider should be returned to *Grimm's Fairy Tales* along with the other hobgoblins of the past.

William D. Coston,
Peabody, Lambert & Meyers,
Counsel to the National
Mass Retailing Institute

TO THE EDITOR:

Since there is reason to believe that RPM provides a fertile ground for horizontal cartelization, the costs of enforcing the antitrust laws (which concern James C. Miller III) might actually increase rather than decrease following its legalization. Thus the current per se rule can be seen as a cost-effective tool in the enforcement of other, more important, aspects of antitrust policy.

The "free-rider" problem is not the sole, or even most important, motivation for reaching RPM agreements. Other things being equal, I believe that manufacturers and dealers both prefer "soft" (nonprice) to "hard" (price) competition. However, it is not obvious that their interests in this respect are, as Frank Easterbrook maintains, "the same as consumers."

Free-riding may seem "unfair," but in only a few cases will it be inefficient or inimical to the consumer's interest. If the full-service dealer (or its supplier) is driven out of business and if consumers really want these services, the survivors will be compelled to spruce up their own service. New and more imaginative entrepreneurs will find a way. One can now buy the same brand of gasoline at the same station with or without the service. RPM may well foreclose more marketing innovations than it creates.

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The test for an improvement in consumer welfare is conceptually simple: RPM must lead to more *physical* units being sold (higher sales revenue is not relevant).

Another, perhaps better, policy option was suggested many years ago by Donald Dewey: The manufacturer should be free to exercise as much control as it can over resale price by threats, boycott, and cajolery. The courts, however, should be directed to refrain from enforcing such contracts. This change would remove the state's patronage of price-fixing and relieve the antitrust agencies of a problem not worth solving.

Milton Z. Kafoglis,
Emory University

TO THE EDITOR:

There are few, if any, products for which the possibility of "free riding" justifies the price increase that results from resale price maintenance. Most instances of RPM have involved common consumer goods, such as underwear and boxed candy, for which manufacturers can hardly cite a need for technical sales information. Even for products for which information is important, RPM would force consumers to pay the cost of providing information whether they need it or not. Moreover, it has been my experience that discount sellers of high-tech goods such as stereos are often more knowledgeable than salespeople in full-price department stores.

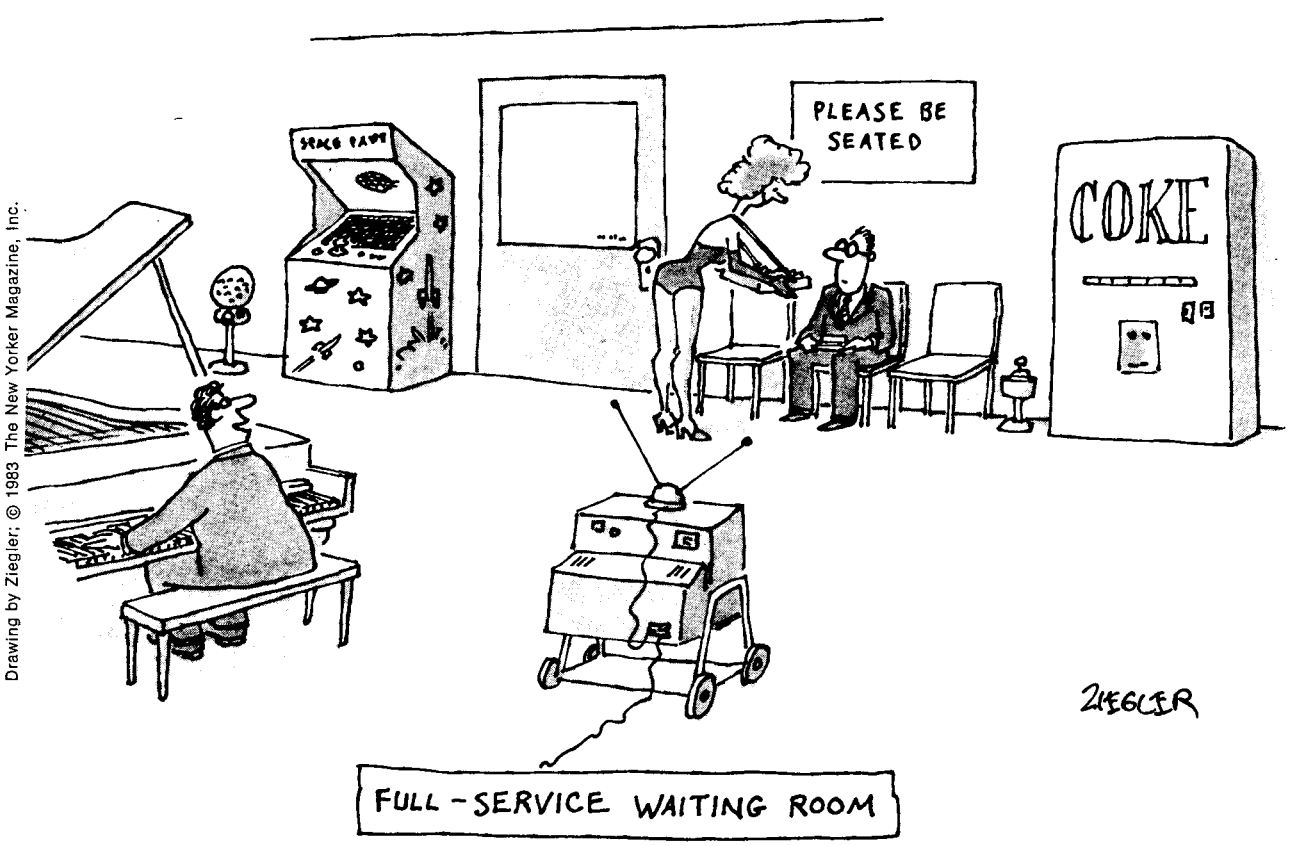
Both Easterbrook and James C. Miller III ("An Analytical Framework") acknowledge that the practice is a tool for forming and maintaining a cartel. Easterbrook responds that cartels have always been violations of the Sherman Act and should be prosecuted as such. As an official charged with state enforcement of the antitrust laws, however, I know how difficult it can be to detect and prove the existence of a cartel. A far more practical approach is to deny competitors this important tool of collusion.

Charles O. Monk, II
Deputy Attorney General,
State of Maryland

TO THE EDITOR:

Robert Pitofsky's defense of the per se illegality of RPM demonstrates again how easy it is to cross the thin line between procompetitive antitrust enforcement and liberal paternalism in antitrust guise. His attack on RPM is premised on a "jeans are jeans" view of merchandising. Yet it is readily apparent that in fashion merchandising the value of a product to consumers reflects not only its physical characteristics but also its perceived desirability or "image." Consumers simply derive more satisfaction, for example, from smartly promoted high-fashion jeans carried in stores like Saks than they do from physically similar unbranded denim garments laid on the table at K-Mart. Indeed, the key to the success of "discount fashion" marketers is not that they offer absolute low prices but rather that they exploit the consumer's desire to obtain image goods at less than their "regular" cost. Discount marketers—if not their intellectual defenders—clearly recognize that the overall selling environment maintained by fashionable distributors, and manufacturer promotion geared to that environment, create product value on which they can trade.

Pitofsky's failure to comprehend —or more probably his visceral unwillingness to acknowledge—this phenomenon wrongly leads him to reject a "free-rider" analysis in



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fashion merchandise even while acknowledging its importance in computers and other hard goods. In fact, however, free-rider problems are most severe in the fashion area and hardest for manufacturers to deal with by measures other than RPM. Because "image" value is environmental, and largely reflected in such overhead items as layout, sales force ratios, fashion shows, and catalogues, consumers can readily obtain that value (by browsing, for example) while purchasing from discount outlets. Manufacturers, on the other hand, can neither supply the added value themselves nor contract to pay for it (at least without violating the Robinson-Patman Act's rules on price discrimination). Without RPM, manufacturers resort to selective distribution as a second-best solution. Unfortunately, this invites the burdensome legal tangles over cut-offs, anti-diversion restrictions, and refusals to deal that Phillip Areeda's essay highlights ("The State of the Law," *Regulation*, January/February 1984).

Pitofsky is willing to force this distortion in the name of antitrust because he believes that RPM eliminates competition at the retail level. He ignores the evidence that unless there is a comprehensive retail cartel, uniformity in retail prices simply channels competition into the services desired by consumers (and manufacturers), with retailers' net margins normalized through the competitive process. Similarly, when he contends that RPM lessens price pressure on wholesalers and thus increases their profits, he ignores the question of how a competitive wholesaler can be forced to reduce prices without reducing product quality.

Pitofsky should be free to act on his abhorrence of "image" value by buying all the generic jeans, underwear, and shampoo that the market will produce. His liberal credo, however, should not be enshrined in the antitrust laws to deprive other consumers of the satisfaction they get from high-fashion image merchandise.

Bert W. Rein,
Wiley, Johnson & Rein

FRANK EASTERBROOK responds:

Coston and I do not disagree about the value of discounters. Many consumers value the combination of price and service they provide. May they thrive and multiply! The question is not whether discounters are valuable but whether it should be a crime for some manufacturers to decide that *their* products should be sold in other ways. The principle on which we welcome discounters —let diversity increase, and let the consumer decide—also shows the value of the existence of other ways to sell products. If a manufacturer hits on a combination of product, price, and service that attracts buyers, but at the expense of discounters, what concern is this of the law? Or do discounters claim legal protection from particular choices? Once some manufacturers sell without vertical restraints, consumers have protection from cartels. Once consumers are protected, on what account should the law protect discounters?

I'm not sure what Coston means when he says that the free-rider argument has "no empirical basis." Suppose a perfectly valid survey shows that 90 percent of all computer buyers place their orders with the same full-service outlets where they obtain information and service. It is the other 10 percent we worry about. Most merchants would not take comfort from a survey showing that 90 percent of all customers are not shoplifters.

Coston's argument displays a common fallacy—he confuses average effects with marginal effects. A retailer responds to the productivity of his efforts at the margin. The fact that there are some or many intramarginal customers will not cause the retailer to render the service that the marginal customer wants. The only evidence worth knowing is whether those who use restricted distribution please enough customers to increase their sales. Sometimes they do, and such systems flourish; sometimes they don't, and these manufacturers impose no restrictions (or pay the price of failure). There are no universally right answers here, certainly nothing that supports sending people to jail for choosing a particular method of distribution, as Coston proposes.

The Hazards Of Ethylene Dibromide

TO THE EDITOR:

William Havender raises some of the appropriate issues in his discussion of the Environmental Protection Agency's handling of ethylene dibromide ("EDB and the Marigold Option," *Regulation*, January/February 1984). Unfortunately, he also misses some critical points. Part of the problem with the article can be seen in the title itself. Havender has taken an inadvisable remark by a relatively minor EPA employee, who had nothing to do with the decision-making process on EDB, and used it as a derisory example of an argument supporting a ban on EDB.

Havender states that the human dose of EDB is "far too small to be seen with the unaided eye" and that humans would have to eat "at least 250,000 times as much food every day over a lifetime" to equal the dose of EDB that produced cancer in rats. These arguments speciously ignore legitimate issues of potency and the widely accepted premise that a carcinogenesis bioassay is not intended to simulate human exposure levels.

Certainly, as Havender implies, the EDB situation raises serious questions about how the agency arrives at determinations of risk and risk acceptability. A most important and disconcerting observation is that all of EPA's risk estimates were based on data unsuitable to the estimation methods used and the conclusions reached.

In the study on which EPA based its decision, EDB was administered to rats through a tube inserted directly into the stomach, a technique known as "gavage." Approximately half the tumors ascribed to EDB were localized in the forestomach, which was exposed to high concentrations of the chemical. EDB is an irritant that causes cell death and damage at high concentrations. Current concepts of chemical carcinogenesis suggest that high levels of such local tissue irritation disproportionately increase the incidence of tumors at the site of administration. This fact argues against inferring from the test results the likely risks arising from actual dietary exposure.

Another serious fault with the EDB gavage study was that, because of acute toxicity problems, it was necessary to interrupt the dosing of the animals. EPA attempted to correct for this interruption by using a computational method that treated the study as if there had been no interruption. Such an adjustment leads to an overstatement of the test substance's toxicity. Moreover, the agency's method of estimating risk included a modification that had not undergone peer review by the risk assessment community and that at this date has not been accepted.

(Continues on page 49)

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Perspectives
on current developments

The Bubble Upheld

The sporadic review of environmental issues by the courts is a bit like a bridge game in which every tenth card is played by kibitzers who wander in from the kitchen. The Supreme Court's unanimous June 25 decision upholding the Environmental Protection Agency's use of the "bubble" concept was important not only because it supports the use of economics in environmental protection, but also because it proposes to leave more of the game to the players and less to the kibitzers.

The rationale for the bubble is something that every schoolchild knows by now from reading *Regulation*. "Command-and-control" approaches to pollution abatement are likely to be inefficient in the sense that either more pollution reduction could be obtained at the same cost or less money could be spent attaining the same level of pollution reduction. (See "The Emerging Market in Air Pollution Rights," by Bruce Yandle, July/August 1978, and "Bubbles and Efficiency," by M. T. Maloney and Bruce Yandle, May/June 1980, among others.) Many of these inefficiencies are lessened, if not eliminated, if EPA puts an imaginary bubble over all the machines or processes in a plant, allowing firms to redistribute emissions from one point to another so long as the total pollution leaving the bubble does not increase.

Although some news accounts described the bubble as if it were a creature of the Reagan EPA, it really dates back to the Ford administration and had won the support of at least one wing of the Carter administration as well. The agency first embraced the concept in 1975 when it adopted a rule treating each plant as a "source" for purposes of complying with New Source Pollution Standards in areas that had not attained compliance with National Ambient Air Quality Standards. The D.C. circuit court of appeals struck down this effort in the case of *ASARCO* v. *EPA*. Since the purpose of the relevant section of the act was to improve air quality, it said, no increase in pollution could be permitted at all, regardless of any offsetting reductions.

EPA was not discouraged, however, and came back for another try. This time it applied a bubble policy in areas that had already attained air quality standards and in which the objective was to avoid deterioration. In this case, the relevant sections of the statute explicitly mentioned the possibility that a source of pollution could be an entire plant, and the D.C. circuit ruled in the *Alabama Power* v. *Costle* case that the bubble approach was not just permitted, but mandatory.

The current case arose from what looks like a deliberate decision by EPA to relitigate the *ASARCO* result. In 1981 the agency put out rules allowing "non-attainment" states to use bubbles in setting up their permit programs for new or modified major sources of air pollution. While the agency offered various ingenious grounds on which to distinguish this policy from the policy struck down in the *ASARCO* case, none were persuasive to the D.C. circuit, which overruled the agency in an opinion of almost record brevity for a major EPA case (*Natural Resources Defense Council, Inc.* v. *Gorsuch*). The case then went to the Supreme Court, having changed its name to *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*

As a technical legal matter, the case hinged on statutory interpretation, specifically what Congress meant when it talked about "sources" of air pollution. Did it mean each process, or each plant, or did it mean to leave the choice to the EPA? Such questions are not unusual in regulatory litigation, and the canons by which to resolve what Congress intended are familiar. If the words of the statute are not clear, the courts look at the general purposes of the statute and at the materials that comprise its

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"legislative history," giving due deference to the agency's interpretation of those sources.

How much deference is due, however, is the subject of a lot of conflicting precedent. At a minimum, agency constructions of statutes are entitled to great weight. Some courts go further, and one can find a respectable pile of cases saying judges must defer to an agency decision so long as it is not totally arbitrary. (Some would say such modesty is most common when the court agrees with the agency.) However, since courts must also ensure that agencies act only within the bounds of their legal mandate, one can find an equally respectable pile of cases saying that courts are the final arbiters of the intent of Congress and of the meaning of statutes. In fact, when it was proposed to codify this judicial supremacy a couple of years back in the "Bumpers Amendment," it was argued that courts do not really defer all that much anyway.

In the bubble case, the Supreme Court started off by relying on the "deference" line of cases, emphasizing the complexity of the issue and the importance of regulatory expertise. It then went through the usual detailed parsing of the technical terms of the statute and of the various congressional statements about the legislation. But then, instead of using these sources to conclude that EPA's reading of congressional intent was either correct or at least sufficiently supportable to be entitled to judicial deference, the Court took an unusual leap. It concluded that Congress had been trying to reconcile conflicting interests in environmental protection and economic growth, but that, insofar as the bubble policy itself was concerned, *Congress had no intent*. In such circumstances the agency's decision that the bubble was a good idea was simply not subject to judicial reversal.

> Congress intended to accommodate both interests, but did not do so itself at the level of specificity presented by this case. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

The opinion went on to say that it was for the political branch of government, not the courts, "to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration . . . in light of everyday realities." These words are rich in potential consequences for environmental regulation and for administrative law generally. The word "potential" deserves some emphasis, though, because much depends on whether the Court reads the concepts enunciated here broadly or narrowly.

The most immediate consequences are environmental: the bubble has been legitimized. Since thirty-two jurisdictions have taken advantage of the EPA program, this is significant. More generally, the Court was more receptive to the need to trade costs against environmental factors than it has sometimes been. Granted, this took the form not of announcing a principle on the Court's own behalf but of observing that Congress had shown concern about economic factors. But there have been a number of past cases in which similarly vague expressions of congressional concern counted for little.

The most interesting general outcome of the case is to strengthen the authority of agencies with respect to courts. The crucial question that remains is, by how much? The Court was careful to put in a footnote saying that this complete deference to the agency applied only in the absence of a congressional intent: "If a court, applying traditional tools of statutory construction, ascertains that Congress had an intention on the precise point at issue, that intention is law and must be given effect." Moreover, the Court has come close to proclaiming a similar rule of deference before, though never quite as bluntly, without working any legal revolution (see *Ford Motor Credit Co.* v. *Milhollin*, 1980).

It is possible that *Chevron* could mean only that a court must make a ritualistic finding that Congress did indeed have an intent before it gets down to the real business of reviewing the agency's reading of that intent. This ritual

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would be readily accomplished by a nod at the legislative history of the statute, since it is easy to fish some intent or other, perhaps any desired intent, out of the vast and murky pond of contradictory committee reports and floor statements. The late Judge Harold Leventhal compared interpreting legislative history to looking over the crowd at a cocktail party trying to spot your friends. In a large legislative record, as at a large party, a judge will always be able to find a few.

On the other hand, the case could mean that the Court is starting to crack down on some of the more scandalous ways that legislators and their staffs have learned to manipulate the process of judicial review. Drafters have turned statutory language into an artful patchwork of ambiguous terms and hints to reviewing judges; various interests have competed to fabricate and insert in the record materials purporting to elucidate Congress's true "intent." The Justices have already been expressing occasional irritation about this. In the *Chevron* decision, they may be telling Congress that it can make the crucial policy decisions, or it can let the executive branch make them while expressing its general bounds of concern, but it cannot obfuscate the choices and let the various factions reargue the whole mess in court under the guise of interpreting legislative history. The second shoe to drop could be a general reduction in the seriousness with which much of the material of legislative history is taken, which would broaden the "Congress had no intent" category and result in a considerable increase in agency authority. (Actually, that might be the third shoe, the first being the legislative veto case, which forbids Congress to make amorphous delegations while reserving piecemeal control, and the second being *Chevron* itself.)

The case has some other implications that can only be touched on here. The Court:

- Broadened agencies' power to change their minds on policy. If an agency's policy is based on interpretation of congressional will, it is hard to change it later just because it turns out not to work. The agency must go back to Congress. If the agency is making up its own mind, by contrast, it is allowed to learn from experience.
- Commented that agencies may "properly rely on the incumbent administration's views of wise policy," noting that "while agencies are not directly accountable to the people, the Chief Executive is." This logically suggests that the Court will not be sympathetic to efforts to cut off agencies from the supervision of the institutionalized presidency and its organs.
- Did nothing to undercut the importance of decent rulemaking processes within an agency. It noted with approbation that "the agency considered the matter in a detailed and reasoned fashion."

Taken together, these three parts of the opinion would seem to limit the potential reach of last year's "air-bag" decision to exactly what the Court said at the time—that the agency had simply failed to explain why it was making the choices it made.

If the Court's de-emphasis of broad legislative history holds up, it could change the nature of arguments to and by regulatory agencies. At present, given the detail and ambiguity of the statutes involved, these too often consist of long rehashes about which Senate or House member said what on the floor or what crucial phrase got smuggled into a footnote on page eighty-three of a committee report that actually appeared two months after the bill passed. Once these matters become irrelevant, people will have to find something else to argue about, and it might even be about the substantive merits of alternative policies. Like a good adventure story, the *Chevron* case leaves one anxious to read the sequel.

Cable Tackles the "Must-Carry" Rules

Not many businesses find themselves in the sad position of being legally obliged to distribute their competitors' product. But then, not many businesses find themselves in the happy position of having a legal right to seize their competitors' product and distribute it without their consent. The cable television industry finds itself in both positions at once—and its problems may have a lot to do with its privileges.

Congress has given cable systems a "compulsory license" to retransmit the signals of distant TV stations without their consent (See Henry Geller, "Making Cable TV Pay?" *Regulation*, May/June 1981). With the sweet, however,

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has come the bitter: a regulation of the Federal Communications Commission provides that cable systems *must* carry the signals of the over-the-air TV broadcasters in their area who are their chief rivals. Now the FCC is coming under growing pressure to modify or repeal the "must-carry" rules—setting the stage for another epic Battle of the Communications Interests of the sort that has enlivened the past few years in Washington.

When the FCC adopted the must-carry rules in 1966, its rationale was explicitly to help the over-the-air broadcasters. By using broadcast signals, the commission believed, cable operators acquired an obligation to conform to the "public interest" goals that applied to the broadcast field, and one of those goals was for local broadcast service to be kept healthy and to reach as many residents of an area as possible. In 1968 a federal appeals court sustained the rules as both constitutional and a reasonable exercise of the "ancillary authority" that the FCC claims over cable TV as part of its statutory mandate to regulate over-the-air broadcasting.

The rules remained largely uncontroversial until the explosion in cable offerings in the late 1970s, when such satellite-based services as Home Box Office and Cable News Network grew to be serious competitors to the three broadcast networks. Suddenly there was a large number of channels in high demand from viewers. This was not much of a problem for the newer cable systems in major markets that offered sixty or eighty channels. But 32 percent of all cable systems, representing 18 percent of subscribers, offer twelve channels or less, and 21 percent, representing 15 percent of subscribers, are in the thirteen-to-twenty channel range. Depending on how many local broadcast stations they must carry, such systems may have little or no room for even the most popular cable-only services. This problem will be lessened with time, since older systems are often rebuilt with greater capacity. In the meantime, however, the systems and the cable networks want access now, not a decade from now. Their battle is proceeding on a number of fronts.

The Quincy Cable Case. In late 1979, Quincy Cable TV, Inc., a Washington state cable system, formally asked the FCC to waive the must-carry rules so as to let it drop the signals of three Spokane stations. Quincy argued that its subscribers would find other signals to be of more interest than the Spokane signals and that in any event they could pick up the broadcast signals over the air. The FCC denied the waiver request in March 1983. Quincy then asked the D.C. federal appeals court to reverse the commission's decision, arguing that the rules violate the First Amendment rights of both cable operators (by interfering with their editorial control) and viewers (by depriving them of their right to choose a wide diversity of cable programming). It also claimed violation of the Fifth Amendment guarantee against "taking" private property for public use without compensation.

In March 1984 the court sent the case back to the FCC because the facts had changed; Quincy Cable had expanded from twelve to thirty-two channels since the ruling. But Quincy has asked the FCC for the waiver anyway, arguing that its particular circumstances make waiver desirable even with its expanded channel capacity and that in any case the expansion did not alter the issue of constitutional rights. The court has given the agency until September to act on the new petition.

The Turner Petition. In October 1980 the Turner Broadcasting System filed a petition for rulemaking asking the FCC to delete the must-carry rules in light of the new developments in the cable industry. The petition failed to rouse the commission to action; so did a petition for expedited consideration that Turner filed in March 1983. Turner went to court to compel the commission to act on its petition, and on April 6, 1984, it did so, rejecting the Turner petition in a short opinion. The commission said that circumstances had not changed enough to warrant a formal review of the rules, but promised to address the constitutional issues further when it rules on the *Quincy Cable* case. Turner is continuing to fight the FCC's order in the D.C. court of appeals, raising most of the same issues it had raised earlier.

Broadcasters strongly oppose any loosening of the rules. First, they say, some viewers would be unable to receive some local signals, because cable subscribers will often dismantle their rooftop antenna or will not bother to use the off-air switch, if they have one; indeed future "cable sets" may not be built to receive

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In Brief–

Crimestoppers' Notebook. Federal regulators have begun a nationwide crackdown on another dreaded social evil: candies flavored with alcoholic beverages. The boozy bonbons include rum balls, bourbon toffees, and chocolate-covered Grand Marnier cordials. A 1938 federal law bans the sale of confections that contain more than 0.5 percent alcohol; it was apparently passed to prevent children from besotting themselves at the corner candy store, but it also keeps adults from buying the stuff.

Lax enforcement of the law had led to a proliferation of kirsch kisses and brandied brittle, at least until a recent series of factory raids by federal inspectors. An account in *Reason* says that the Food and Drug Administration admits it catches violators only because competing candy makers inform on them. "Once we slap somebody's fingers, they become real tattletales," said FDA official Raymond E. Newberry.

Petal Pushers? The year's weirdest trade-policy initiative—or something close to it—is a request by Roses Inc., an association of American flower growers, that the U.S. International Trade Commission investigate the Colombian rose industry. Last year spot checks of the more than 10,000 boxes of cut Colombian flowers air-freighted to Miami daily turned up 1,600 pounds of cocaine. Roses Inc. figures that both the exporters and importers of these flowers must be getting bribes from Colombian coke dealers to smuggle the drugs past customs, and it argues that the bribes amount to a subsidy of Colombian rose exports. The group wants the ITC to put a dollar value on the subsidy and impose a countervailing duty to offset it, as authorized by the General Agreement on Tariffs and Trade.

According to the *Economist*, which reported the story, "If the bribes are in any way related to the value of the smuggled drugs, they could be worth a fortune. The 1,600 pounds of seized cocaine alone has a street value of over $70 million—close to the $100 million a year that Colombia earns from exports of cut flowers to America. But the ITC is unlikely to accept Roses' argument. Apart from the difficulty of getting the flower exporters to answer questions like, 'Do you receive payments from cocaine traders?', the ITC is unwilling to raise the thorny issue of private (i.e., non-government) export subsidies."

Consumer Protection Flips Its Lid. Should General Motors be barred from making any more convertibles in order to protect owners' investments in existing cars? That is the question now before a federal court in Baltimore in a lawsuit filed by two Maryland men against the giant automaker.

Convertibles virtually disappeared from U.S. auto showrooms by the late 1970s. Chrysler stopped making them in 1971, Ford in 1973, and GM in 1976. In that year GM announced that it would roll one last batch of 14,000 Cadillac convertibles off its assembly line—"the last convertible in America." Collectors eagerly snapped up the cars, and dealers charged high premiums, according to the *Washington Post*.

In a few years, however, consumer fashions shifted again, and convertibles staged a modest comeback. GM's Pontiac division launched a convertible in 1982, soon followed by Ford and by other GM divisions, including Cadillac.

That was unwelcome news for the plaintiffs in the Baltimore suit, Abraham P. Korotki and Richard K. Adolph. Korotki says his '76 Eldorado lost some of its collectors' interest and declined in resale value after GM resumed production. His suit asks the court to stop GM from making any more convertibles and pay $50 million in damages to the 14,000 owners of '76 Cadillacs.

The suit has been going on for a year now and was argued in July. GM declines to comment on the case except to say that the allegations are "ill-founded" and should be dismissed.

Walter Mondale's Position on Deregulation. "I think it's gone far enough for a while. We ought to digest the results of a mammoth deregulation period: airlines, railroads, financial communities, communications, and so on. I have not suggested re-regulating."

—From an interview with the Democratic presidential nominee excerpted in the June 25, 1984 issue of Fortune.

over-the-air broadcasts. Without must-carry, they claim, at some point the growth of cable service will so weaken broadcasters economically as to force some of them out of business, leaving cable operators with a dominant position in local video markets. This would diminish the range of free video services and disrupt the universality of local service. Cable interests reply that there are less intrusive ways to assure that viewers get access to local TV, such as special switches that permit viewers to switch more easily from cable to over-the-air television. This, they argue, is a most reasonable accommodation, giving the cable viewer access to both local TV and the new cable services.

In Congress, there are proposed bills to please each side. Senator Paul Trible (Republican, Virginia) has introduced a bill (S. 2539) that would codify the must-carry rule into statutory law. The Senate Commerce Committee appears to lean toward keeping the rule. When it reported S. 66, the cable deregulation bill, to the Senate floor, its report stated:

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> The committee recognizes the importance of local programming and opposes anything that would undercut that service. While the committee believes that the answer to this issue may ultimately [be] found in the marketplace, under the current regulatory framework and existing copyright law, the committee sees a need to continue the existing must carry rules to protect the public interest. Of course, the FCC may need to resolve problems that may arise.

Some members of the House of Representatives are looking farther ahead. Representative Barney Frank (Democrat, Massachusetts) has introduced a bill (H.R. 1388) that would phase out many cable regulations, including must-carry, in favor of wide latitude for marketplace forces. In particular, the Frank bill would repeal the "compulsory license" that currently gives cable the right to carry the signals of distant TV stations without asking their consent.

The Frank bill will not pass this Congress. It does, however, make an attempt to resolve the real problem that underlies the dispute, namely the mutual dependence of cable and broadcast. So long as cable relies on government intervention to give it broadcast signals on government-specified terms, it can hardly expect government to free it from the regulatory obligations of the broadcast system, including that of local service. And so long as broadcasters rely on government intervention to get their signals onto local cable systems, they can hardly expect government to protect their right to keep those signals from escaping further.

If Congress reacts to this clash of two strong industries in its usual way—by running for cover—the issue may wind up in the lap of the courts. The outcome is unclear. For there are two conflicting judicial trends, both epitomized by decisions in the latest Supreme Court term. One is a growing tendency to grant First Amendment protection to telecommunications (as in the case of *FCC* v. *League of Women Voters,* in which the Court allowed public broadcasters to editorialize). The other trend, which is perhaps even stronger, is to sustain FCC policies that purport to strike a balance between contrasting goals (as in the case of *Capital Cities Cable, Inc.* v. *Crisp,* in which the Court allowed the commission to preempt state regulation of cable). Even if the latter trend eventually carries the day, the FCC will continue to face the question whether the best way to achieve such a balance would be to cut the Gordian knot and remove marketplace constraints from both sides, cable and broadcast, at the same time.

A Legislative Boost for Risk Assessment?

Cost-benefit balancing in health and safety regulation has still not attained universal popularity. Few of its critics concede, of course, that they wish to regulate even in cases where the costs outweigh the benefits. But many argue that cost-benefit analysis is inherently biased in favor of risk creators. The costs of risk regulation, the story goes, are usually easy to assess, whereas the benefits in disease, injuries, and deaths avoided are elusive and prone to undervaluation. Better not to conduct the balance at all, it is argued, than to indulge in a calculation that might be fraudulent or manipulable.

Risk *assessment,* on the other hand, is an analytic technique that might seem immune to these objections, since it measures *only* the potential benefits of regulation. Moreover, its role in regulatory decisions is correspondingly modest: all it presumes to do is to help regulators identify the worst problems and select the best candidates for regulation. It is hard, at first blush, to think of any reason to be against it.

But, as Benjamin Cardozo once observed, the springs of conduct are subtle and varied. Which explains why H.R. 4192, the "Risk Assessment Research and Demonstration Act" presently pending before Congress, is not likely to be enacted by unanimous consent.

The bill, introduced by Rep. Don Ritter (Republican, Pennsylvania) and eighteen cosponsors, is certainly modest enough. It instructs eight federal agencies—FDA, EPA, OSHA, NRC, DOE, CPSC, DOT, and USDA—to conduct coordinated demonstration projects in risk assessment over two years. Each agency's project would assess the risks of one product or activity typical of those the agency normally regulates. The projects would explore the risk

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implications of alternative courses of action, compare risks of substitutes, identify needed areas of research, and place the hazard studied in the broader context of other environmental hazards. The agencies would then prepare and submit to Congress a report on the entire exercise, and also make some effort to educate the public about the relative magnitudes of risk in different settings.

Innocuous as these objectives may seem, and despite a good bit of support for the bill in the scientific community, the bill has more than a few opponents. Many witnesses testified against it at the latest House hearings on the bill this May and June. Although the bill passed the House in 1982, it died in the Senate, and prospects for its passage remain uncertain.

Perhaps the reasons for the bill, and for the opposition to it, can be found in the ways in which risk assessment can be used—and abused. On the one hand, intelligent risk regulation is impossible without adequate information. If a regulatory agency does not assess the magnitude and relative severity of different risks, it ends up looking and acting ridiculous. The Consumer Product Safety Commission, for example, tried at one time to regulate risks on a first-come, first-served basis, investigating regulatory targets simply in the order in which it received complaints about products. This proved most unsatisfactory, for obvious reasons. And as Peter Huber has pointed out in these pages, regulators who do not adequately assess the risks of alternatives may end up banning the less hazardous substances and driving consumption toward the more hazardous substitutes.

On the other hand, risk assessment is typically attacked as burdensome and dilatory, leading to "paralysis by analysis." There is something to this. The returns on risk assessment diminish rapidly once the magnitude of a risk has been bracketed in relation to the risk of substitutes and alternatives. The one exception is in cases where a regulation can be fine-tuned along a continuum to achieve a more detailed balance of costs and benefits, as in setting a maximum exposure level for a chemical. But in most other settings, laboring further to perfect risk estimates simply perpetuates the status quo, with all its attendant hazards.

Nevertheless, if the opposition to the risk assessment bill is grounded on a fear that more elaborate risk assessment will result in less stringent risk regulation, it is misguided. Excessive risk assessment is the enemy of change, not of regulation. Stasis and safety, though often mistaken for each other, are by no means the same thing. Overly fussy and cautious risk assessment can hold up regulation. But it can also hold up deregulation, whether in the form of the "wholesale" repeal of regulatory standards or in the "retail" deregulation that occurs when an agency issues a permit for a new risk. Likewise, inadequate risk assessment can lead to hasty and ill-considered cases of either regulation or deregulation.

In fact, half the world finds risk assessment a burden about half the time. Which half you belong to depends very much on whether there is a statutory presumption for or against the class of products or activities you are interested in. If you have invented a new drug, pesti-

Regulatory Reform, C. 1525

From the *Twelve Articles of Peasantry*, a document stating the demands of the rebellious German workers at the time of the Peasant Wars of 1525. The author, Sebastian Lotzer, was a journeyman in the Furriers' Guild:

Article Nine. We protest against the extreme arbitrariness with which new regulations are constantly made, so that we are penalized, not according to the nature of the case, but at times with animosity, at times with favoritism. We believe we should be penalized according to well-established written law, and that the case shall be treated accordingly, not on the basis of caprice or favor.

—German Humanism and Reformation, *edited by Reinhard P. Becker, copyright 1982 by the Continuum Publishing Company. Reprinted by permission.*

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cide, or food additive, you will tend to believe that FDA risk assessment already goes into too much detail. On the other hand, if you are an employer, an established industrial polluter, or someone else who operates under a regime of act-now-regulate-later, you may discern considerable virtue in more exhaustive risk assessment. It depends on whether you profit from regulatory delay.

Each side can point to its horror stories of excessive cost and delay. Risk assessment for a new drug typically takes four to ten years and tens of millions of dollars; for a new pesticide, two to seven years and an average of almost $7 million; for a new food additive, three to ten years and an estimated $500,000. Consumer and environmental groups, for their part, complain that OSHA and FDA moved at a glacial pace to regulate a number of established workplace toxins and food additives, such as red dye number two and saccharin, even after test data had turned up to indicate a hazard.

And each side, by contrast, has had its turn in successfully arguing to the Supreme Court that too little risk assessment has been conducted in other matters. The antiregulation forces won their round in the *Benzene* case; the proregulation troops prevailed last term when the Court disapproved the attempted repeal of the air-bag standard. In both cases the Court concluded there had been too little risk assessment to justify the proposed change in the regulatory climate.

The crucial decisions on how much risk assessment to conduct are routinely kicked to the courts, because they hinge on the interpretation of extraordinarily vague legislative code words. When a law refers to "safe and healthful working conditions," "unreasonable risk of injury from consumer products," or "safe" drinking water, it is inviting an agency to assess risks, though it rarely specifies how precise a risk assessment and on what evidentiary basis. Is it "reasonably necessary or appropriate" to regulate a proven animal carcinogen introduced into the workplace, or must a "significant risk" to the health of the *human* employees be demonstrated? Only the courts can tell us for sure.

Reviewing courts thus can play risk assessment like an accordion, tightening or loosening regulation by the simple expedient of making never-ending demands that one side provide more detailed risk estimates. The D.C. circuit court of appeals is quite experienced at saying no to *regulatees* by saying yes to more risk assessment; other circuits have mastered the same art in saying no to *regulators*.

Only the Supreme Court can tell us once and for all how much risk assessment is just enough and no more. But the Court's pronouncements are painfully slow in coming (no wonder, since one side or the other always has an incentive to master the art of dilatory litigation). And often they are not definitive at all. The upshot is that agencies frequently have to operate without any clear understanding of when and how much risk assessment is appropriate under the statutory mandates Congress has given them.

The executive branch, even without congressional encouragement, recently took an independent initiative to try to clarify matters. Five agencies formed an Interagency Risk Management Council that is starting to work on these problems. Nevertheless, congressional participation is essential in any serious reform, because health and safety agencies are so hampered by the fragmented delegations of authority and opaque descriptions of duties in their controlling statutes. Without legislative action, the quantity and quality of risk assessment required of particular agencies must continue to be determined by the mood of judges and the skill of appellate lawyers. Though the Risk Assessment and Demonstration Act is not likely to clear up the whole muddle, it might be a first step.

There is no doubt that risk assessment is still a primitive art, and the numbers that emerge from its practice will often be subject to political manipulation. Nevertheless, some assessment of risks will always be implicit in agency conduct, whether or not Congress chooses to act. There will be those who prefer that administrators ignore the magnitude of a risk when regulating it, just as there are those who prefer not to think about regulatory costs. But if cost can sometimes be ignored when regulating risk without producing unmitigated foolishness, risk itself cannot. It is one thing to declare that a snake is loose in the garden and must be hunted down at any cost. It is quite another to insist that the snake hunter should proceed with eyes firmly closed.

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Viewpoint

Edmund W. Kitch

Taxi Reform–The FTC Can Hack It

TAXICAB REGULATION has long been used in the scholarly literature as an example of a kind of regulation that reduces consumer welfare. Most city governments artificially limit entry to the taxi business, thus curtailing the availability of taxis and driving up the fares they charge. In some cities, one taxi operator enjoys an exclusive franchise, as if it were a public utility—although the taxi business lacks the economies of scale that are said to produce a "natural" monopoly.

Up to now, however, municipal reformers have frequently despaired of ever mounting a successful challenge to the system. Taxi owners have a huge stake in the current set-up: in New York, for instance, their monopoly power is so well established that the mere right to drive a cab—a so-called medallion—sells for $50,000 or more. They fight furiously to protect that investment against any proposal to loosen regulation. Moreover, the whole panoply of interests that profit from city franchising, contracting, and favoritism tend to close ranks against any outside scrutiny. The only way to break their grip, one might think, is to make a federal case of the issue.

Nonetheless, many observers were surprised May 10, when the Federal Trade Commission (FTC)—after more than a year of study by its staff—issued complaints against the cities of Minneapolis and New Orleans challenging their regulation of taxicabs as anticompetitive. In the public mind, the FTC is known for filing complaints against large business firms, not against cities for their regulation of small businesses. But the complaints should not have come as a surprise to the student of antitrust. They reflect three trends that have long been under way in the field of antitrust law.

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THE FIRST TREND is the growing tendency of antitrust enforcers to take as part of their charge the impact of government regulation on competition. This enforcement interest followed the emergence of a consensus among scholars that regulatory restraints are often as important as private restraints in undermining competition and reducing consumer welfare. The Department of Justice (DOJ) led the way. Its Antitrust Division boasts of its "competition advocacy" in national and international forums. It has a special Regulated Industries Section that has made its presence felt in numerous federal agency proceedings. And some of the department's most important antitrust cases in the last decade, most obviously the AT&T case, have dealt with regulated industries.

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The second trend has been the Supreme Court's willingness to extend the reach of the Sherman Act to ever more local restraints on trade. The antitrust laws have always applied only to interstate commerce between the states. This was a significant limitation on their scope back in the days when the Court maintained a real distinction between commerce that was interstate and commerce that was not. The expanded concept of interstate commerce that entered constitutional doctrine in the late 1930s was slow in coming to the antitrust area, but it

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has now arrived. In *McLain* v. *Real Estate Board of New Orleans, Inc.* (1980) the Court held that local real estate brokers are engaged in interstate commerce for antitrust purposes. Thus small local businesses that formerly escaped Sherman Act coverage because they were not "in" interstate commerce can no longer do so.

A third trend has been the Court's steady contraction of the scope of antitrust immunity based on "state action." In the case of *Parker* v. *Brown* (1943) the Court had held that a California state program designed to reduce the output of raisins could not be challenged under the antitrust laws because it was state rather than private action. It was not until some years later that this doctrine began to erode. A key turning point was *Cantor* v. *Detroit Edison* (1976), which held that a regulated utility could not immunize its policy of offering free light bulbs to its customers on the grounds that free bulbs were an element of a rate package which it had filed with the state regulatory commission and was required to obey. The decision implied that to be protected by the state action doctrine, the conduct challenged had to be not simply formally required by state law, but the result of a state choice to compel the challenged conduct.

The logical culmination of this trend was to expose cities and their officials to liability for municipal regulatory actions taken by the cities on their own, as opposed to state, authority. In *Community Communications* v. *City of Boulder* (1982), the Court held that a city could be sued under the antitrust laws for actions taken pursuant to its own regulatory authority—in that case a "freeze" imposed by the city council upon the plaintiff's expansion of its cable TV services. The Court held that a city can claim immunity under the state action doctrine only if its action is explicitly authorized and supervised by the state. (Actions taken pursuant to properly enacted state regulatory requirements remain fully immune.) The cities are, so to speak, under the wing of their state "parents"; when the parents are watching them closely the federal government will defer to their authority, but it will step forward *in loco parentis* when the kids are off on their own.

These three trends coalesced to make it very likely that some federal enforcement agency would challenge restrictive municipal regulation of local businesses. It might even have been foreseen that taxicabs would be chosen as a target, since there has been an important (if little-noted) grass-roots movement toward taxi deregulation in cities as politically diverse as Berkeley, Charlotte, Dayton, El Paso, San Diego, and Spokane, among many others. In fact, to assist other cities in their reform efforts the FTC released an unusually thoughtful and cautious 176-page study of taxi regulation by Mark Frankena and Paul Pautler of its Bureau of Economics.

The FTC's initiative brought a speedy reaction from Congress. The House with little debate passed an appropriations rider at the behest of the Louisiana and Minnesota delegations barring the use of FTC or DOJ funds to pursue actions against municipalities. In the Senate, however, that rider became entangled in the wider question, much discussed since the *Boulder* decision, of whether local governments should be subject to antitrust complaints at all. Congress had already been struggling with this question for some time.

It is easy to see why Congress has come under pressure to overrule *Boulder*. City officials are distressed by the possibility of being held personally liable for treble damage awards, just as if they were business executives. Of course, the city they work for might well agree to indemnify them as office holders for any such awards; this is what usually happens with judgments under the civil rights acts. But if so, it is arguably pointless to saddle the municipal taxpayer with yet another expense; bad enough for consumers to lose the first time through the anticompetitive behavior, without letting them lose a second time as taxpayers to some lucky plaintiff.

Finding a workable compromise between these concerns and the concerns of antitrust enforcement has not been easy. For example, the Department of Justice drafted a bill (S. 1578), introduced by Senator Strom Thurmond (Republican, South Carolina), that would give all municipal actions the same immunity as action by the state itself, with one exception. That exception would consist of actions taken by cities in their role as owners of property or enterprises, such as utilities and parking lots. The idea is that cities would assume only the same sort of antitrust liability private firms would assume if they operated

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the same enterprises. But the cities have found that bill unsatisfactory because it fails to provide complete immunity. At the same time, supporters of antitrust enforcement have found it unsatisfactory because it would leave cities free to impose unreasonable regulatory restraints on competition. It has languished in committee.

City officials have pointed to a "parade of horribles" that would result from municipal antitrust exposure. But the FTC taxicab complaints avoid those horribles. They do not seek either Draconian or retrospective penalties....

Paradoxically, the FTC's action may have provided a way to break this legislative impasse. City officials have pointed to a "parade of horribles" that would result from municipal antitrust exposure. But the FTC taxicab complaints avoid those horribles. They do not seek either Draconian or retrospective penalties, merely the reform of municipal regulation in the future. They show how federal enforcement of municipal antitrust violations could act as a safety valve, permitting Congress to free local officials from the fear of devastating liability in private suits while preserving the chances of making progress in removing harmful municipal restraints. That would mean not restoring cities to full immunity, but limiting the remedy for a violation to the type of essentially injunctive relief sought by the FTC in the taxicab complaints. The terror would be gone; a solid core of reformist policy would remain. When lawmakers recessed for the Fourth of July, a compromise along these lines seemed to be emerging.

The principal argument that has been made in opposition to the new FTC complaints is that they are offensive to principles of federalism; that it is not the proper role of a government commission in Washington to tell local governments how to regulate their local businesses. But clogs on interstate commerce imposed by local regulation have long been viewed as an appropriate concern of the federal government. In the famous case of *Gibbons* v. *Ogden* (1824), Chief Justice John Marshall, upon flimsy statutory authority, invalidated the exclusive franchise New York State had granted to Fulton and Livingston steamships upon its navigable waters. The defendant Gibbons had flouted the franchise by providing steamship transportation between Manhattan and points on the New Jersey side of the harbor. The case of taxicabs is not so very different: a principal function of the contemporary taxicab is to carry passengers to and from airports in the course of their long-distance travel.

John Marshall's extended *obiter dictum* in *Gibbons* v. *Ogden* on the exclusiveness of the commerce power later flowered into the "negative" or "dormant" commerce clause doctrine, the doctrine that since the Constitution entrusts regulation of interstate commerce to the federal government, it implicitly forbids the states to interfere with some portion of it. For almost a century the Supreme Court has applied this doctrine by striking down some of the barriers state and local governments have erected to national competition. With so many pressing matters on its agenda, however, today's Court has little time either to analyze or to police these often mundane transgressions (although even the current Court takes an occasional quixotic stab at it on behalf of such causes as keeping the interstate highways open to large trucks).

WHAT CAN BE USEFUL, in this bureaucratic age, is an institutional successor to the spirit of the Supreme Court's negative commerce clause doctrine. Such an institution should have its own in-house economic expertise. It should have long experience with antitrust questions. It should be able to develop the type of sophisticated record necessary for an enlightened understanding of often complex regulations whose economic effects are felt at numerous different levels. And it should have the independence and visibility needed to be the antitrust policeman of the nation's local governments, whose multitudinous and varied regulations operate far from the center of political, media, and scholarly attention. One agency is best suited to collect information about and analyze the effects of local economic regulation—and to follow, in appropriate cases, with a complaint designed to remove the harmful features of the regulation. In short, this is a case for the FTC. ■

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CAPTIVE OF THE COURT
A Federal Agenc

Jeremy Rabkin

THE CHANCERY SUIT OF *Jarndyce* v. *Jarndyce*, in *Bleak House*, was one of Charles Dickens's most inspired creations: a suit into which "innumerable children have been born . . . innumerable young people have married" and "innumerable old people have died out of." Its present-day American equivalent is known at the moment as *Adams* v. *Bell*, a suit that is now approaching its fifteenth year of continuous activity. Its plaintiffs, nominally an assortment of obscure citizens, claim to speak for some 75 percent of the American people, neatly classified by race, sex, personal and linguistic handicap. The defendant is a government agency, the Office for Civil Rights (OCR) in the Department of Education (formerly in the Department of Health, Education, and Welfare). Over the years the *Adams* litigation has generated a continuing stream of complex remedial orders, which by now reach into all fifty states and the District of Columbia. Essentially, the suit has succeeded in placing this executive agency in what might be called judicial receivership, allowing a single federal judge—and a handful of private civil rights lawyers—to determine how it should enforce the civil rights laws Congress has confided to the agency's responsibility.

In the annals of contemporary judicial activism, perhaps only Judge Garrity's receivership of the Boston school district offers a parallel instance of interventionism on this scale. Just like the Boston busing case, the *Adams* litigation has taken the presiding judge, John Pratt, deeper and deeper into administrative detail—and further and further from his originally declared purpose. And just as the Boston public schools are now more segregated and more racially divided than they were when "desegregation" began there, the *Adams* litigation has left OCR in many ways a less effective and less trusted civil rights guardian than it was at the outset.

The most notable difference between the two cases is that, while Judge Garrity's direction of the Boston schools generated intense controversy from the beginning and is now widely condemned, the *Adams* litigation seems to be regarded in Washington as a force of nature. Congressional appropriation committees have meekly acquiesced in the personnel demands of the *Adams* orders and, until its recent vigorous appeal of the latest round of orders, the Justice Department patiently submitted to Judge Pratt's authority. Leading commentators in administrative law, like Harvard's Richard Stewart and Chicago's K. C. Davis, have nodded in approval at the *Adams* litigation; and no law journal has seen fit to question, as a constitutional monstrosity, the spectacle of a federal enforcement agency subject to ongoing judicial

Political scientists, usually so keen on exposing the mechanisms of agency "capture" by special interests, have displayed no curiosity at all about the spectacle of a federal agency held captive by partisan advocacy groups through continuing court orders.

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How a Partisan Critique Became a Lawsuit

Adams v. *Richardson* was launched in the fall of 1970 as an action against Elliot Richardson, then secretary of the Department of Health, Education, and Welfare (HEW). Kenneth Adams, a black student in a Mississippi public school, obligingly lent his name to the case and then, still more obligingly, retired from any further role in the proceedings. The suit was actually initiated by the NAACP Legal Defense Fund, which recruited the Washington law firm of Rauh, Silard and Lichtman to conduct the litigation. Senior partner Joseph Rauh, a founding member of the Americans for Democratic Action, had already gained prominence as a leading critic of the Nixon administration, and the suit proved to be an excellent platform for his criticisms.

At the outset, the *Adams* suit focused entirely on OCR's enforcement of Title VI of the 1964 Civil Rights Act. Title VI prohibits "discrimination on the basis of race, color or national origin" in "any program or activity receiving federal financial assistance." It authorizes federal funding agencies to terminate funding to any recipient that refuses to cease discriminatory practices. The *Adams* suit charged that HEW (through its OCR unit) was not enforcing Title VI with sufficient vigor—and "focused" this complaint on enforcement activities in seventeen southern and border states.

The initial brief for the "plaintiffs" ventured six different causes of action in legalistic terms. But these were offered, "apart from their individual merits," as the brief candidly stated, as "symptoms of a general and calculated default by HEW in enforcement of Title VI." This political charge was, of course, the real crux of the suit, which accordingly invited the federal district court to oversee the broad enforcement policies of the responsible executive officials. As it happens, the political charge was substantially untrue; it rested on a fundamental misconception of OCR's enforcement capacity, a misconception that would haunt the litigation over the following decade and a half.

But first it is worth noticing how casually an essentially political complaint came to be accepted as the proper subject for a lawsuit—for the judicial heedlessness reflected in this acceptance would also haunt the litigation over the following decade and a half. How, to begin with, could Kenneth Adams have standing for such a suit? If he—or his champions in the Legal Defense Fund—believed that his own school was not meeting the prevailing legal standards for desegregation, it would have been quite easy for him to sue his own school district for direct relief. But how was he at all legally injured by OCR's alleged enforcement failures in *other* school districts and indeed in *other states*? Even if he prevailed on the merits in this lawsuit of continental dimensions, there could be no assurance that the resulting judicial remedy—with its comparably continental sweep—would actually redress the particular

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local injury suffered by young Mr. Adams. And if he should prevail on the merits, why was poor Kenneth Adams the appropriate party to negotiate a remedial order on behalf of millions of others (who might well have very different concerns and priorities for OCR enforcement policy than he)? As if to preempt such questions, Rauh and his colleagues also offered the names of assorted "taxpayers and citizens" in various southern states as alternate or supplementary plaintiffs—suggesting that quite literally *anyone* might challenge executive enforcement policy in this area.

Remarkably, Judge Pratt in his initial decision did not find it necessary to say anything about who the plaintiffs were or why they had standing. Nor did the D.C. Court of Appeals in ruling on the Justice Department's protest of Judge Pratt's decision. Both courts evidently regarded standing as a mere anachronistic legalism that could not be allowed to deter the judiciary from correcting an administrative default. This cavalier approach was to have fateful consequences later on. By not specifying the precise parties injured by the default—as the judges would have been forced to do in confronting the standing question at the outset—the case took on a completely open-ended character that allowed it to expand to uncontrollable proportions in later years. In 1982, incidentally, noting that the suit had never been certified as a class action, the Justice Department sought to discover whether plaintiff Adams was (improbably) still in school and thus at all in need of the "further relief" then being sought. Judge Pratt summarily blocked the inquiry as irrelevant to the proceedings.

Equally cavalier—and perhaps equally fateful—was the appellate court's response to the argument that Judge Pratt's order was an impermissible infringement of prosecutorial discretion. Some years earlier, in dismissing a suit against the Justice Department for failing to take action against the harassment of civil rights workers in Mississippi, the same court had unanimously reaffirmed the constitutional doctrine of the unreviewability of prosecutorial discretion. In *Moses* v. *Katzenbach* (1965), the court declared that "the considerations of judgment and discretion apply with special strength to the area of civil rights. . . ." Yet in *Adams* the D.C. circuit court brushed this principle aside. "It is one thing," it declared, "to say that the Justice Department lacks the resources necessary to locate and prosecute every civil rights offender; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools." But surely it would be true of *any* school district, however technical or ambiguous its offense, that if HEW did not choose to punish its noncompliance with immediate funding termination, HEW would ipso facto "affirmatively continue to channel federal funds to it." And this surely could not change the fact that HEW, like the Justice Department and indeed like any other enforcement agency, would inevitably "lack the resources necessary to locate and prosecute every civil rights offender."

Judge Pratt's initial decision in the district court, handed down in 1972, found that OCR had delayed too long in moving to terminate federal funding to several hundred inadequately desegregated school districts. But OCR itself had identified these school districts as noncompliant and had never suggested that it could offer them complete dispensations from its compliance standards. The only issue was how long OCR could negotiate with these school districts in attempting to secure voluntary compliance. On this both the statute and the legislative history were silent. Nevertheless, Judge Pratt imposed a series of deadlines for the processing of OCR enforcement actions. The actual time frames were suggested by Joseph Rauh on the basis of his own estimates of what would be a reasonable period for administrative action—again without reference to any statutory or legal criteria. The court of appeals, affirming Judge Pratt's decisions, swallowed this improvisation without a murmur early in 1973.

From the outset, then, the *Adams* case asked Judge Pratt to do something quite different from merely "interpreting the statute and determining whether HEW has correctly construed its enforcement obligations"—as the court of appeals complacently put it. The case essentially required the judge to second-guess enforcement policies in a large regulatory program. This remarkable intervention seems to have been premised as a practical matter on two related assumptions: first, that OCR had been delinquent in enforcing civil rights standards, owing to the political machinations of the Nixon administration; and second, that its enforcement responsibilities were relatively clear.

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The Fate of Black State Colleges

One issue in the *Adams* litigation has from the outset taken an erratic course all its own: the question of what to do with black state colleges. A number of states, including a few northern states, had long maintained state colleges with largely black faculties and student bodies. A successful process of integration, by its nature, would end the existence of these colleges, at least as distinctively black institutions. But for more than a decade now, the *Adams* court has been hectoring the Office of Civil Rights (OCR) to integrate these state college systems without threatening black colleges.

In the late 1960s, OCR warned ten states—Pennsylvania, Maryland, Oklahoma, and seven southern states—that they could lose their federal funding if they did not take affirmative action to eliminate the "racial identifiability" of their public colleges. None of the states was by then denying admission to any college on the basis of race, but black students were still applying overwhelmingly to the traditionally black colleges and white students almost exclusively to the others.

In general, the black colleges maintained far more lenient admissions requirements, and their complete merger with white colleges might therefore lower overall standards or force many black students out of college. Redistributing faculty arbitrarily among campuses posed other problems, since the qualifications of the two groups of faculty were quite different, as judged by such criteria as advanced degrees and publication records.

Thus, by the time of the original *Adams* decision in 1972, OCR had not yet figured out what measures it wanted the dual college systems to take, and naturally had still not reached agreement with these states on "corrective measures." The plaintiffs accordingly persuaded Judge Pratt to order OCR to initiate enforcement proceedings in this area, as in the others.

When the case was appealed, the D.C. court of appeals received an *amicus* brief from an association of black colleges, urging that the higher education elements in *Adams* be dismissed as a threat to their well-being. This appeal had its effect. In this one area, the higher court balked at Judge Pratt's presumption—not at all on legal grounds, but simply following its own policy instincts. The court declared that in higher education the problem was not, after all, the absence of statistical integration. Instead it was "the lack of state-wide planning to provide more and better trained minority group doctors, lawyers and other professionals" in which connection "black institutions currently fulfill a crucial need." Rather than dismiss this portion of the *Adams* suit, however, the appeals court simply overturned Judge Pratt's deadlines, holding that OCR must be given more time to "carefully assess the significance of a variety of new factors."

Careful assessment only revealed the intractability of the policy dilemmas involved, and OCR made little progress. So in 1974 the plaintiffs challenged the agency's settlements with eight of the states involved on the grounds that they did not assure enough integration. In April 1977 Judge Pratt ordered OCR to develop specific criteria for desegregation while "taking into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks."

OCR then came up with an elaborate set of requirements, prescribing numerical "goals" for recruitment of black students and teachers to white colleges (although without parallel goals for recruiting whites to black colleges). More strikingly, it demanded that state systems encourage white students to apply to black colleges by eliminating "unnecessary program duplication" between nearby white and black institutions—thereby thrusting itself into the heart of educational planning in these states.

By 1982, following the imposition of a new set of deadlines by Judge Pratt in 1980, OCR had managed to obtain detailed compliance plans from all the affected states. It had also pledged to review the progress of these plans and renegotiate "more effective" plans within a few years if they did not have the expected effects. But the *Adams* plaintiffs were still not satisfied and went back to court. Judge Pratt agreed in 1983 to impose a new set of deadlines on OCR for negotiating new agreements with state systems that had not made enough progress. Given the intractability of the problem and the implacability of the plaintiffs, this part of the litigation, like the rest of the *Adams* enterprise, will undoubtedly stretch on for untold years to come.

–Jeremy Rabkin

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Unfortunately for Judge Pratt, the truth was almost the exact opposite on both counts—as the subsequent history of the litigation would prove.

Forcing the Unenforceable

Like many sections of the 1964 Civil Rights Act, Title VI, as applied by civil rights agencies, came to mean something rather different from what its legislative sponsors had originally envisioned. During the congressional debates on the measure, concern about the possibility of funding cutoffs was by no means limited to die-hard champions of states' rights. Critics warned that cutting off federal funding would punish the innocent along with the guilty, harming black school children, for example, as much as segregationist school officials. Moreover, congressmen could be especially embarrassed by sudden withdrawal of federal funding from their districts.

In response to such concerns, the supporters of Title VI attached an array of conditions to the funding sanction. For example, the law prohibited its use until the funding agency "determined that compliance cannot be secured by voluntary means" and thereafter provided any accused recipient with a chance to rebut noncompliance charges in a formal administrative proceeding. Even then, the law provided that no cutoff occur until thirty days after notification had been given to the relevant appropriations committees in both houses of Congress. The Johnson administration itself assured wavering members of Congress that suits by the Justice Department (under another section of the 1964 Civil Rights Act) would provide the principal leverage for its desegregation efforts, not threats to terminate funding under Title VI. Thus Senator Abraham Ribicoff, floor manager for Title VI in the 1964 Senate debates, assured hesitant colleagues that "it would be a rare case when funds would actually be cut off."

The unusual circumstances of the mid-1960s, however, allowed HEW officials to escape for a brief period from these structural and political constraints. Congress had enacted the 1964 Civil Rights Act in response to mounting public revulsion at racial segregation in the South. As public attention focused on the dramatic struggle to desegregate the schools in that region, HEW's enforcement of Title VI was given great impetus. And the enactment of the first large-scale federal aid-to-education measure in 1965 afforded the department extraordinary financial leverage.

At first, circumventing all the restrictions carefully written into Title VI, HEW officials simply refused to approve grants to any southern school district unless it committed itself to a detailed plan for desegregation approved by the department. This tactic of "deferring" new funds, combined with cajolery and other inducements, succeeded in persuading the vast majority of southern school districts to take their first halting steps toward desegregation. Congress subsequently amended Title VI to outlaw the "deferring" technique after overreaching officials rashly tried to apply it to Mayor Daley's Chicago schools in 1965. But HEW's political momentum had already been established. The department needed no great political courage to initiate formal defunding proceedings in 1966 and 1967 against the several hundred hold-out school districts that refused to take any steps at all toward desegregation. And the overwhelming majority of these districts, too, capitulated before their funds were actually terminated.

The charge that the Nixon administration had worked a sudden reversal in this enforcement momentum was fed in part by administration rhetoric aimed at mollifying opinion in the South. But HEW's own statistics tell a different story. In 1968, when Nixon was elected, some 68 percent of black students in the South were still attending substantially all-black schools. By the fall of 1971 that figure had plummeted to 9.2 percent. Meanwhile, the proportion of black students attending predominantly white schools climbed from 18 percent in 1968 to 43 percent in 1971. On a statistical basis, the school systems of the *Adams* states were more fully integrated than those of the North and West, largely as a result of vigorous prodding by OCR. By 1970, the Nixon administration was actually pushing OCR to finish the integration drive quickly—so as to remove the issue from the 1972 elections.

Both Judge Pratt and the D.C. appeals court acknowledged this impressive progress in their initial opinions. But they were more impressed by the fact that HEW had initiated some 600 formal proceedings to stop federal

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funding before 1970, but "only a small token number" since then, as Judge Pratt put it. The court pronounced this pattern "particularly significant in view of the admitted effectiveness of fund termination proceedings in the past to achieve the Congressional objective."

But the political isolation of the South—the essential prerequisite to aggressive reliance on the funding sanction—had been on the decline even before Richard Nixon entered the White House. In 1968, for example, over the sharp objections of Johnson administration officials, Congress had attached riders to the HEW appropriation requiring uniform policies and standards for Title VI enforcement throughout the country and the assignment of the same number of OCR enforcement officials to the North and West as to the South. At the time these riders were enacted OCR had subjected only one school district outside the South to a funding termination proceeding.

The political climate for civil rights enforcement was growing increasingly inhospitable, moreover, in large part because enforcement aims had greatly altered by the early 1970s. In the late 1960s, when OCR launched funding cut-off proceedings against hundreds of school districts, it was threatening only school districts that refused to accept race-blind assignment of students to the nearest schools. It was not until 1968 that the Supreme Court first endorsed the principle of racially (rather than geographically) based school assignments as a remedy for past segregation. And only in 1971 did the Court rule that cross-district long-distance busing could be imposed on desegregating school systems for the sake of statistical integration. HEW officials had indeed anticipated both decisions, trying from 1967 onward to cajole school districts into adopting ever more "effective" integration plans, as measured by the racial statistics of the moment. But it had pursued these larger enforcement ambitions almost entirely on the basis of bluff, without actually daring to invoke formal termination proceedings to back up those bluffs.

The initial judicial intervention in *Adams* was essentially an effort to call these bluffs. The core of Judge Pratt's 1973 injunction was directed at 201 school districts, which the plaintiffs had culled from OCR's case files in the course of pretrial discovery. Judge Pratt ruled that the agency's negotiations for voluntary compliance had gone on too long with 116 of these districts—all of which had been charged with inadequate integration many months earlier—and ordered OCR to initiate proceedings to terminate their funding within sixty days if it could not secure compliance agreements by then. In the remaining 85 districts, OCR had been fitfully investigating statistical evidence of racial imbalance (which put these districts in "presumptive noncompliance"). Judge Pratt ordered the agency to reach formal determinations of compliance or noncompliance within sixty days and then take action against the noncompliant districts in the same "time frames."

The main effect of these deadlines was simply to confirm that the agency had indeed been bluffing. OCR strove to achieve quick agreements by curtailing its own ambitions. Well over half the districts already charged with noncompliance proved to be much closer to compliance or much readier to remedy their deficiencies than the agency had realized in months and months of previous negotiation. Similarly, well over half the districts being investigated for presumptive noncompliance proved, on further quick inspection, to be in full compliance with the latest integration standards after all.

In districts where the agency could not reach quick agreement or a quick finding of compliance, it simply ignored Judge Pratt's enforcement deadlines. A full year after the court orders went into effect, OCR was still negotiating with several dozen of the school districts involved and threatening fund cutoffs to thirty-one of these districts. In only one case had it actually initiated formal proceedings to terminate funding.

If judicial intervention was intended to revive the credibility of OCR's funding sanction, it failed almost entirely. Judge Pratt never managed to wring from the agency, in all the years thereafter, more than the "small token number" of enforcement proceedings that he complained of in 1972. While the number of defunding proceedings each year between 1967 and 1970 averaged almost 150, the average fell to less than 12 a year between 1973 and 1978, and dwindled almost to zero between 1979 and 1984. On the other hand, the court could not prevent OCR from falling back on the obvious

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alternative to bluffing in extended negotiations —namely, settling for more modest enforcement goals. Civil rights lawyers complained a good deal about the quality of OCR's investigations and the indulgent character of its settlements. But the plaintiffs did not try to involve Judge Pratt in the hopeless task of reviewing hundreds of separate settlements.

Instead they returned to court to pursue the same strategy that had achieved so little in the first round. In the spring of 1974 they asked Judge Pratt for further relief, complaining that OCR had still failed to resolve the compliance obligations of 40 school districts in the group of 85 presumptively noncompliant districts cited in the initial order fifteen months earlier. Beyond this, they complained that OCR had "regressed to its previous practice of inaction in hundreds of school districts," citing over 600 new cases where school districts were evidently or presumptively out of compliance with integration standards. In most of these districts, as the plaintiffs were well aware, complete racial balance could not be achieved without forced busing, and OCR was under tremendous political pressure not to impose busing.

In the summer of 1974, while the new *Adams* charges were still pending, Congress enacted this broad-based anti-busing sentiment into an amendment to a major education law. The amendment prohibited any federal agency from ordering "the transportation of any student to a school other than the school closest or next closest to his place of residence." The law did not prevent the courts from venturing new busing schemes in ensuing years. Top HEW officials, however, announced that they would respect the new restriction, which meant that a new round of court orders in *Adams* would be an empty exercise.

Nevertheless, in March 1975 Judge Pratt issued a new set of deadlines for action against several hundred school districts. Again OCR proceeded to go through the motions of investigating and settling, without actually securing much further integration and, of course, without actually invoking its sanction of funding termination.

But Pratt's orders also included a provision that turned out to give the litigation a renewed lease on life. Previously, the court had told OCR to act in cases in which the agency's own evidence suggested noncompliance. At the plaintiffs' urging, Judge Pratt laid down time frames for OCR to process any "complaint or other information of racial discrimination" regarding any school district in the South from any party whatsoever. OCR would have to investigate each such complaint within ninety days, negotiate for voluntary redress or compliance within the next ninety days, and if such negotiation failed, initiate formal enforcement proceedings within thirty days thereafter. The deadlines were suggested by the plaintiffs, who offered no argument or evidence in their behalf. Nor was the court given any indication of the range and complexity of issues that might be addressed under the catch-all formula of "complaint or other information of racial discrimination." In fact, this open-ended formula laid the basis for bringing almost all of OCR's enforcement efforts under the eventual control of the court.

New Missions, New Plaintiffs

OCR's implementing regulations for Title VI had promised that the agency would respond to any "complaint or other information of racial discrimination" involving an institution with HEW funding. But the regulations did not commit the agency to any particular response, much less to any deadlines in making this response. The provision, in fact, had little significance when the regulations were first issued in 1965 or during the rest of the 1960s. In those early years, OCR was almost entirely preoccupied with the effort to integrate southern school districts, and this enforcement effort relied almost entirely on racial enrollment statistics, collected for all school districts on an annual basis by the agency itself.

In the early 1970s, however, as integration drives in the South either achieved their ultimate objectives or bogged down in disputes over busing, OCR began to turn its attention to new kinds of discrimination issues. Initial efforts to challenge de facto school segregation in the North proved very discouraging, owing to intense political resistance and the difficulty of documenting official intent as a contributing factor in racial imbalance (as the courts still required). And here too there was the looming problem of busing. Instead, OCR began to

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focus on issues relating to the internal operations of schools. It asserted authority to regulate the recruitment, selection, and promotion of teachers, for example—as well as their assignment to different schools—to prevent discrimination. In this area, following Equal Employment Opportunity Commission precedent, it felt free to define discrimination in statistical terms unrelated to intent. Toward this end, it began to collect relevant statistics on a nationwide basis. Similarly, it warned school districts against "discriminatory" imposition of student discipline sanctions and began collecting statistics from them on this. Guidelines were also issued on the assignment of students to different academic tracks within schools and the equitable funding of different programs within and between schools, again relying on statistical definitions of discrimination.

Title VI prohibits discrimination on the basis of national origin as well as race, and the agency seized on this to open another field of enforcement. In 1970 OCR notified school districts that in not taking "effective" steps to remedy the academic problems of "national origin–minority group" students, they would be violating Title VI—at least if the students' problems could be traced to their difficulties with the English language. Eventually under this policy schools were not only required to make an elaborate "educational diagnosis" of all students with English-language difficulties but also to provide them instruction in their native language (with "culturally suitable" materials) if necessary to maintain their academic progress.

Congress gave powerful additional impetus to this regulatory expansion with two new statutes, modeled on Title VI: Title IX of the Education Amendments of 1972, prohibiting discrimination on the basis of sex, and section 504 of the Rehabilitation Act of 1973, prohibiting discrimination by reason of handicap. By the mid-1970s, OCR had developed implementing regulations for these new statutes, which reached even more deeply into the internal operations of schools and colleges and staked out even more far-reaching notions of discrimination than Title VI. The Title IX regulations, for example, asserted enforcement jurisdiction over all aspects of school employment policies, from pensions to sick leaves, for all categories of employees, while also reaching guidance counseling, housing, health care, athletic programs and extra-curricular clubs—with discrimination usually defined in terms of statistically disparate impact rather than invidious intent. The section 504 regulations defined the term "handicap" to include such disparate problems as drug addiction, facial disfigurement, and speech defects; discrimination against the physically impaired was stretched to encompass failures to provide the special services, special facilities, or modified selection and promotion criteria (for students and employees alike) that would allow handicapped individuals to function like others.

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By the mid-1970s, then, OCR had developed a regulatory agenda of breath-taking proportions, envisioning unprecedented social transformations in several areas. In contrast to OCR's earlier goal of desegregating southern schools, however, the new agenda was extremely diffuse. Virtually every school district and college in America was arguably in violation of some aspect or another of the new requirements. It was not at all obvious where to begin enforcement efforts or where to concentrate these efforts. Nor was it at all obvious what the new requirements should be expected to achieve in many areas. Though pedantically detailed in some respects, the regulations were filled with ambiguities at crucial points, leaving to subsequent enforcement the task of resolving what such phrases as "reasonable accommodation" to the handicapped really meant. Meanwhile, OCR's regional investigators, accustomed to confronting southern school officials over simple racial enrollment figures, were plainly ill-prepared to negotiate complex new issues, such as the proper scale of bilingual education or women's athletic programs, in any sort of cooperative, understand-

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ing manner. Yet there was no reason to suppose that OCR's ultimate leverage—its defunding sanction—would be any more widely available or credible in enforcing these complex new requirements than it had become in the later stages of the integration drive.

OCR's situation in the mid-1970s thus demanded a careful assessment of enforcement strategy and priorities. But this was precisely what the *Adams* litigation prevented. In the first place, the court orders of March 1975 simply absorbed too large a portion of OCR's enforcement resources. In June 1975 OCR officials testified that their regional offices in the South were forced to devote so much effort to comply with this directive that only 14 percent of their manpower was available for all other enforcement activities, such as efforts against sex discrimination and "language barrier discrimination." They petitioned Judge Pratt to extend or eliminate the deadlines for processing new complaints of race discrimination. Over the protests of the plaintiffs, he agreed to allow extensions of up to six months on the original deadlines. It was not enough.

In January 1976 OCR was sued by various parents of Mexican-American students and "other concerned Mexican Americans" in several southern states, represented by the Mexican-American Legal Defense Fund. They complained that OCR regional offices had been turning away their complaints on the grounds that the *Adams* order required them to "give priority to complaints of discrimination on the basis of race." They now petitioned Judge Pratt to allow them to intervene in *Adams* to protect their share of OCR resources. Meanwhile, the Women's Equity Action League (WEAL) had filed suit against OCR the year before for "failing to enforce adequately the laws designed to eliminate sex discrimination." Following the example of the Mexican-American group and citing parallel experiences with OCR regional offices in the South, the women's groups also sought intervention in *Adams*. Judge Pratt admitted the Mexican-Americans but, warning of "overloading the boat," tried to keep the women's groups out. WEAL promptly appealed this ruling and won an order from the court of appeals to admit the women's groups to *Adams*.

In fact, the original *Adams* plaintiffs themselves did not oppose these interventions or the new claims on OCR's resources which they represented. Indeed, Joseph Rauh and the NAACP Legal Defense Fund had launched their own new suit in 1975, styled *Brown* v. *Weinberger*, challenging OCR's failure to enforce integration standards in the remaining thirty-three states of the Union not covered by the *Adams* suit. If OCR did not have sufficient resources to meet all these new demands, Rauh argued, Judge Pratt could order the Office of Management and Budget (OMB) to seek funds and even order Congress to provide them. When Judge Pratt refused to go this far, the plaintiffs settled down to an extended negotiation with OCR officials to draw up enforcement priorities. In June 1976, Judge Pratt duly ratified the resulting plan. It called on OCR to investigate and settle (or move to invoke sanctions on) each new complaint under any of its jurisdictions within six months of receiving it—but allowed deferral in the processing of complaints in certain categories under certain specified conditions. In deference to the *Brown* suit, the plan now covered OCR operations in every state.

As it turned out, OCR had managed to reach agreement with the various plaintiffs only by promising far more than it could deliver. A year later, Judge Pratt was confronted with motions for further relief, protesting that OCR had failed to meet the required deadlines for 64 percent of the Title VI complaints and 69 percent of the Title IX complaints. The backlog of unprocessed complaints, which was supposed to be eliminated in the course of a year under the June 1976 plan, had actually grown larger. Predictably, these filings were followed almost immediately by a suit from the National Federation of the Blind, seeking to intervene in *Adams* on behalf of handicapped complainants, who were receiving virtually no attention from OCR, though the section 504 regulations had already gone into effect.

In what was by now a drearily predictable sequence, the new Carter administration leadership at OCR first tried to have the old orders dismissed and then ended up negotiating a new master plan for enforcement operations. This one was somewhat more flexible in its deadlines but also far more detailed in its direction of priorities. In response to OCR's concern about having all its resources preempted by individual complaints, the plaintiffs negotiated

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the proper number, issue content, and time frames for agency-initiated compliance reviews —and this, too, went into the plan. In response to Judge Pratt's demands, the agency also promised to impress on OMB its absolute need for more resources—a "concession" the agency seems to have been all too ready to make.

For a time thereafter, OCR did seem to be turning over cases at a much faster rate, at least on paper. But by the end of 1980, it was again failing to meet its complaint processing deadlines for more than 60 percent of new complaints and was still nursing sizable backlogs. By the spring of 1981, the WEAL plaintiffs were urging Judge Pratt to impound all education grants until OCR processed its overdue cases or alternatively to sentence top agency officials to jail terms or punitive fines for contempt of court. When Judge Pratt demurred, a new round of bargaining ensued. In March 1983 the judge issued yet another modified set of enforcement deadlines and priorities, as recommended by the oversized club of plaintiff lawyers now engaged in the suit. This time OCR tried to appeal the judge's authority to impose such detailed orders—none of which after all had any basis in statute. That appeal is still pending before the D.C. Court of Appeals.

Assessing the Judge as Chief Executive

The *Adams* litigation failed almost entirely in its initial aim of getting OCR to use its funding sanction. It was equally a failure in restoring OCR's aggressive enforcement of integration standards in cases requiring busing. In response to these failures, the target of the litigation shifted after 1975 to the more general aim of improving OCR's management and operating efficiency. But this effort, too, has proved to be a dismal failure.

The experience of the plaintiffs and the judge in the earlier rounds should have taught them that OCR's problems could not really be blamed on the malevolent machinations of the White House or the indifference of successive presidential appointees at the agency. Still, they refused to face up to the ultimate source of its management problems: driven by its activist traditions from the 1960s and the demands of its new constituencies in the 1970s, OCR's leadership all too rarely mustered the administrative discipline or the political courage to consider the agency's enforcement capacities realistically and target its efforts accordingly. Thus from its first southern integration cases the agency was continually overreaching itself, initiating investigations it could not conclude, making charges and demands it could not enforce. As its agenda expanded in the course of the 1970s, the dissipation of its efforts and energies simply increased.

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Rather than bringing the agency to confront its limitations, the *Adams* litigation in many ways exacerbated its management problems. The agency's internal reporting systems were continually strengthened and refined during the 1970s, but largely in order to serve the data demands of the *Adams* plaintiffs rather than the needs of strong management. While generating mountains of data on the agency's success (or failure) in meeting complaint-processing deadlines, these systems failed to give OCR's Washington leadership much managerial control of regional office operations, or even provide it with a very clear picture of what was going on in the regional offices. As late as 1982, OCR officials admitted that they were not sure why the agency's performance in meeting complaint-processing deadlines varied so much from year to year and from one regional office to another.

What is indisputable is that the pressures of the *Adams* orders shifted OCR very heavily, at times almost exclusively, toward complaint-based enforcement. Many of the complaints the agency received were trivial or frivolous; many, on the other hand, were awkwardly large, calling for investigative procedures the agency had not yet developed or policy decisions it had not yet made. Internal agency studies have repeatedly confirmed what common sense all along suggested: that compliance reviews initiated by the agency itself, with both the site and the scope of the review under its control, are a

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more productive use of resources than the processing of individual complaints. In fact, neither the Civil Rights Division of the Justice Department nor the Equal Employment Opportunity Commission has committed itself to pursuing every complaint it receives. Nothing in OCR's statutes suggests that it has any greater legal obligation in this regard and nothing in its experience suggests that it has any less need for selectivity and maneuvering room than these parallel agencies.

The lawyers involved in the *Adams* litigation insist that, whatever its failings, the suit has at least succeeded in securing extra personnel for OCR over the years. Leaving aside the question of whether this is a proper subject of judicial control, OCR had been growing at a far-above-average rate before Judge Pratt issued his first orders. Moreover, the additional increases that *Adams* brought were neither as large nor as long-lasting as successive settlements or court orders presumed they would be. In several areas they may well have inhibited necessary reforms by perpetuating unrealistic expectations.

Adams has also been praised for generally keeping agency leaders under pressure to improve. But OCR was already under considerable pressure from activist constituencies, and its long-term improvement often required it to resist their overeager demands. In some ways *Adams* made improvements more difficult. Managers knew that any controversial initiative could be quickly challenged by leaks from recalcitrant subordinates or second-guessing from resentful predecessors. At the same time, the intervening authority of the court inhibited successive department secretaries from imposing on OCR the discipline and direction which their own broader perspective and higher status could provide. Former HEW secretary Joseph Califano, among others, has maintained that the agency would have done far better without the interference of the *Adams* court. There is no reason not to take him at his word. The Equal Employment Opportunity Commission, a notoriously mismanaged agency in the late 1960s and early 1970s, improved its performance quite markedly in the late 1970s (in part by shifting smaller complaints to state agencies and developing quick mediation procedures for others)—and without the dubious help of a lawsuit.

Indeed, in retrospect, the failure of the *Adams* litigation seems to have been preordained by its structure. Judge Pratt, though claiming to be better equipped than Congress to oversee OCR's performance and determine its funding and staffing needs, still insisted that he could not be responsible for the details of OCR's operations. For their part, the civil rights lawyers conducting the litigation—and the successive settlement negotiations with OCR—did not really want to consider OCR's enforcement problems very seriously either, since whatever they learned might undermine their explicit litigational premise—that OCR need not establish or rank priorities, that it must do everything, everywhere, when and as demanded by its constituents. Perhaps if its goals had been much more modest, OCR might actually have aspired to full enforcement everywhere, as city fire marshals can make *every* business in town post exit signs and maintain working fire escapes. But the plaintiffs were even more insistent than OCR's leadership on the kind of ambitious, result-oriented enforcement that made this impossible.

ONE MIGHT SPECULATE that Judge Pratt finds a titillating sense of power in running a major federal agency year after year while administrations come and go, or that Rauh and his colleagues have relished the attorneys' fees they have gathered from *Adams* over the years (Judge Pratt having forced the government to compensate them for their efforts at $100–150 per hour). But it is not necessary to follow their example and attribute poor performance to bad motives. It is enough for the court of appeals simply to decide that a national enforcement agency should be returned to the control of officials whom the voters can replace every fourth November. If the court of appeals does not do so, Congress ought to stir itself and exercise its own responsibility for maintaining the separation of powers laid down in the Constitution.

True enough, the administrative scheme laid down by the framers of our constitution does not always ensure that enforcement agencies are well managed. But the *Adams* saga confirms that a lone federal judge and a small band of private attorneys are not likely to do any better. ■

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Why the Sagebrush Revolt Burned Out

Robert H. Nelson

FEDERAL OWNERSHIP of vast areas of western land is an anomaly in the American system of private enterprise and decentralized government authority. Not surprisingly, it has been the target of periodic challenges —two of which have recently come to prominence. One, known popularly as the "Sagebrush Rebellion," was a movement to transfer much federal land to the states. The second was the Reagan administration's proposal to sell large areas of public lands into private ownership—a process sometimes called "privatization."

Both the Sagebrush Rebellion and the privatization movement generated wide debate, but few substantive consequences. Indeed, both by now are effectively defunct. Matters seemingly have returned to normal—with the federal government expected to retain its hold on the public lands after, at most, minor adjustments in boundaries.

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This paper examines how the Sagebrush Rebellion and privatization movements evolved. It concludes that their momentum was largely dissipated, not because the problems of public land management are minor or have been resolved, but because both movements were caught up in critical contradictions on basic principle. These contradictions became apparent, and lethal, as soon as proponents made significant efforts to move from rhetoric to action. In the future, those who want to reform federal land ownership will need a sounder base of ideas—a better ideology, if you will. They will have to abandon some myths about the role of the public lands in the West—including some myths that westerners themselves hold dear.

The Origins of Western Dependence

Historians and other writers on the West have often commented on a central paradox. While the West sees itself as the land of rugged individualism (and votes more conservatively than the rest of the country), it is also the region of the country most dependent on the federal government. Although the narrow strip

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of Pacific coastline from San Diego to Seattle has secured a wealthy and diverse economic base, the intermountain West, the Rocky Mountains, and the western Great Plains still depend significantly on federal support. Paradoxically, it is in these areas of greatest dependence on the federal government that the western ethic of rugged individualism flourishes most. Today, the federal government owns around 50 percent of the land in the West, including 86 percent of Nevada and 47 percent even of California, a leading urban state.

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Throughout the nineteenth century and well into the twentieth, the federal government promoted the development of the West. Federal funds built the dams and aqueducts that supply the West with critical water supplies and the high-speed highways that link its cities. Defense and space programs have fueled the growth of western economies. Federal employment provides a major part of the employment base in some rural areas.

The federal government has also assumed the financial burdens of managing western public lands. Western ranchers, for example, benefit from federal willingness to bear the costs of administering grazing rights and making investments on public rangelands. The federal government gets far less revenue from grazing lands than it spends to administer them. In 1981, the costs of Interior grazing administration were somewhere between $100 million and $200 million, depending on the assumptions made. By comparison, grazing fees amounted to only $25 million, about half of which were earmarked to benefit ranchers through the Range Improvement Fund.

Although there was never any formal document, the federal government and western states for many years effectively had a compact with the following implicit terms. First, the federal government paid most of the cost of western water projects and other public works and of maintaining western land. Second, the West consented to the federal ownership of these properties and the resulting federal control over much of what goes on in the West. Third, this federal power was kept under substantial though not complete control by the West's congressional representatives.

This control was greatly facilitated by the importance of the West in the U.S. Senate. Ten "public land" states (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), with 8 percent of the population of the United States, have 20 percent of the votes in the U.S. Senate. These senators also tend to accumulate seniority: seven Senate committees are currently chaired by Republican senators from the public lands states.

In the 1970s, however, cracks began appearing in this traditional arrangement. There were several reasons. For years, members of Congress from other regions had voted support for western economic development on the belief that western growth was good for the nation as a whole. By the 1970s, however, many eastern and midwestern economic interests had come to see the growth of the West as a threat to their own industrial success.

A second and equally important factor was the growth of the environmental movement. The West itself, like the rest of the country, is internally divided on the proper balance between economic development and environmental amenities. Traditional ranching, mining, and farming pursuits have become less important with the influx of retirees, scientists, government workers, and other white-collar employees. These latter groups place a higher value on recreation and environmental quality, and do not necessarily welcome the arrival of new industry as a sign of progress.

Environmentalists objected to many aspects of the federal role in the West. They began to challenge federal support for water projects, cheap transportation, and other means of promoting western economic development. They challenged the use of public lands for such activities as livestock grazing, timber harvesting, and coal mining, and called for more in the way of creation of wilderness areas, protection of endangered species, establishment of wild and scenic rivers, and the setting aside of archeological and historic sites. They were

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Table 1

KEY ENVIRONMENTAL LEGISLATION
WITH PRESERVATION OBJECTIVES SINCE 1964

Law	Year Enacted	Main Preservation Provision(s)
Wilderness Act	1964	Created national wilderness system
National Historic Preservation Act	1966 (amended 1980)	Expands scope of historic preservation; directs federal agencies to examine impacts on historic properties
Wild and Scenic Rivers Act	1968	Created national wild and scenic rivers system
National Trails System Act	1968	Created national trail system
Bald Eagle Protection Act	1969 (amended 1972)	Forbids killing of bald and golden eagles and protects habitat
National Environmental Policy Act	1969	Requires study of environmental impacts associated with major federal actions
Wild and Free-Roaming Horse and Burro Act	1971	Provides for federal management and protection of wild horses and burros
Endangered Species Act	1973	Bars federal actions that would jeopardize an endangered or threatened species
Eastern Wilderness Act	1975	Extended wilderness system, creating first eastern wilderness areas
Federal Land Policy and Management Act	1976	Requires wilderness review of BLM lands
Surface Mining Control and Reclamation Act	1977	Requires restoration of mined land to original condition
Endangered American Wilderness Act	1978	Added 1.3 million acres of new wilderness
National Parks and Recreation Act	1978	Made important additions to the wild and scenic rivers system, national scenic trails system, and national wilderness system
Public Rangelands Improvement Act	1978	Sets goal to restore rangelands to earlier productivity
Archeological Resources Protection Act	1979	Requires permits for site excavations and artifact removal; provides other protections for archeological resources on federal lands
Alaska National Interest Lands Conservation Act	1980	Establishes large new parks, wildlife refuges, wilderness areas, and other "conservation system units" in Alaska

Source: Robert H. Nelson, "The Public Lands," in Paul R. Portney, ed., *Current Issues in Natural Resource Policy* (Washington, D.C.: Resources for the Future; distributed by the Johns Hopkins University Press, 1982).

joined, increasingly, by those who sought to protect eastern industry and, on some of the public works issues, by those favoring budget-cutting as well. Table 1 shows how Congress responded to these concerns with a flurry of legislation, starting with the Wilderness Act of 1964, most of which significantly affected public land use in the West.

The strength of these new forces is illustrated by the resistance to the growth of western coal production. National environmental groups joined with midwestern and Appalachian coal miners and other eastern mining interests to seek to limit the development of western coal. As has been widely noted, this coalition succeeded in attaching provisions to the 1977 Clean Air Act amendments that made little sense except as an attempt to block growth of western coal production. More recently, the same alliance helped stop legislation to promote coal slurry pipelines.

The environmental movement had perhaps its greatest successes in the federal courts. In the 1974 case of *Natural Resources Defense Council* v. *Morton*, a federal judge in effect ordered the Interior Department to conduct a massive, thirteen-year review—it still has four years to run—of the status of livestock grazing on the public lands in relation to other uses. This massive undertaking would require the preparation of 212 new land use plans (later reduced to 144), costing many millions of dollars. The first land use plans completed by the department under the court order proposed significant cuts in grazing, which were the aim of the environmental groups that brought the suit.

Ranchers were outraged. To add fuel to the fire, the case had been decided by the U.S. district

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court in Washington, D.C., far from the lands at issue. The *NRDC* case became perhaps the single most important event in precipitating the Sagebrush Rebellion.

Another key cause of the rebellion, it is often said, was the Federal Land Policy and Management Act of 1976. That act declared an intent to retain most public lands in federal ownership, mandated land use planning as the basis for management decisions, and generally provided the first formal legislative charter for the system of lands overseen by the Bureau of Land Management (BLM). Nevertheless, the changes it made in public land management were more symbolic than substantive, largely consolidating and formalizing policies that had been put into place well before 1976. For example, the era of disposal of the public lands had pretty much ended with the Taylor Grazing Act of 1934, although the 1976 act made it official. It might also be noted that the act was endorsed and, in significant part, developed by western leadership. In any case, as a symbol of changing times, and as representative of the body of legislation shown in Table 1, the act came to represent for many in the West the new and unwelcome federal policies on western issues.

Western-federal relations deteriorated further when the advent of the Carter administration brought staffers of environmental groups into key policy-making positions in the White House and the Interior Department. The Carter administration proposed in 1977 to cancel a "hit list" of western water projects already under construction and to make water users pay a higher share of the costs of future projects. It proposed strict enforcement of an existing 160-acre limit on the size of farms that could receive low-cost water from the Bureau of Reclamation. It curtailed grazing and limited the use of off-road vehicles on public lands. It aggressively moved forward in reviewing public lands and forest areas for wilderness designation. It proposed legislation to replace the Mining Law of 1872 with a leasing system. It effectively extended for another four years a moratorium on the leasing of federal coal that in 1977 had already lasted six years.

Carter officials were somewhat taken aback by the depth of resulting western antagonism. In their view, they were simply asserting broader national and also western interests against more parochial western interests. Indeed, some argued that they were still faithfully representing western needs; it was just that true western needs had shifted toward recreational and environmental constituencies and away from livestock, mining, and other development activities. As Undersecretary of the Interior James Joseph put it in 1979,

> The old interests which have for so long dictated public land policies have lost control. Many of you have been saying for years that more than stockmen have a stake in how the public lands are grazed; more than miners have a right to suggest how, when and where mining will be done on the public lands; more than loggers care—and may rightfully comment on how our timber resources are managed.
>
> There is nothing particularly mysterious, I now believe, in what is being called the "Sagebrush Rebellion." Indeed, it is the time-honored response of the fellow who upon finding he can no longer dictate the rules of the game decided to take his ball and go home.

No doubt there is some truth to this interpretation. Carter's policies, however, managed to alienate not only the old-timers but the newcomers as well—especially since some of his proposals, like the gigantic synthetic fuels program, threatened environmental as well as traditional western interests. It was a "new politics" Democrat, Governor Richard Lamm of Colorado, who charged that "with regard to public lands, and issues related to public lands, the Carter administration was a western nightmare." By 1979, a *New York Times* headline proclaimed: "West taking South's place as most alienated region."

An Economically Maturing West

During these years, the financial and other assistance contributed by the federal government was becoming less important to the West. In the first place, the West had become the fastest-growing region of the country. From 1970 to 1980, the two states with the most rapid population growth in the country were Nevada (64 percent) and Arizona (53 percent). Five other mountain states placed in the top ten. In 1980 Alaska, California, Nevada, and Wyoming

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placed among the half-dozen highest states in per capita income. Wyoming's per capita income increased by 197 percent from 1970 to 1980, the fastest in the country. Some of the Mountain states still lag behind the U.S. average, but their economies have been catching up rapidly.

With this growth came a richer base for state taxation. Most western states impose severance taxes on production of oil and gas, coal, timber, and other key resources, and also get a major share of the royalties the federal government collects on resources it owns. Partly as a result of the OPEC price hike of 1973–74, these revenue sources rose sharply in the 1970s. As Table 2 shows, three states—Alaska, Wyoming, and New Mexico—are particularly well endowed. Wyoming and New Mexico in 1980 collected $571 and $465 per capita respectively in these levies.

The economic gains of the West in the 1970s fed the flames of rebellion in several ways. First, they increased eastern pressure against federal public works and subsidies for western development. The West could hardly expect its poorer cousins in the Midwest to keep on sending checks; if anything, perhaps it should consider sending checks back. Second. as other sources of income grew relative to federal subsidies, some westerners began to conclude that perhaps the financial and other gains were no longer worth the trouble of having to deal with growing federal restrictions. Finally, the burden of land management costs no longer looked so frightening. To take the clearest example, the federal Bureau of Land Management spent $35.6 million in 1981 managing public lands in California that amount to 17 percent of the state's total area. If the state had taken over management of BLM land and had spent the same amount on management, it would have added only one-tenth of 1 percent to its 1980 budget of $32.8 billion.

Table 2

STATE REVENUES FROM NATURAL RESOURCES, INCLUDING FEDERAL SOURCES

(millions of dollars)

State	1970	1975	1980
Alaska	$942.4	$ 84.5	$1,389.5
Arizona	9.7	12.1	33.0
California	62.3	167.1	431.0
Colorado	9.0	44.1	99.2
Idaho	5.8	10.3	29.3
Montana	18.1	38.0	151.5
Nevada	1.5	1.8	20.5
New Mexico	85.8	174.0	604.6
North Dakota	4.8	9.5	117.5
Oregon	62.3	95.3	278.7
Utah	10.4	20.5	51.3
Washington	15.8	47.2	100.8
Wyoming	31.4	65.3	269.0
Total	$1,259.3	$769.8	$3,575.9

Source: U.S. Department of the Interior, Office of Policy Analysis, *Past and Projected Revenues from Energy and Other Natural Resources in 13 Western States*, September 1981.

Proposals for the federal government to transfer public lands to the states have arisen sporadically for at least 150 years, most often in times of sectional conflict.

The Rebellion Stirs

Proposals for the federal government to transfer public lands to the states have arisen sporadically for at least 150 years, most often in times of sectional conflict. In the 1830s John C. Calhoun proposed ceding federal lands to the states in order to weaken the power of the federal government and thus the threat it posed to slavery and other southern interests.

Another push for cession arose in the second decade of this century, led this time by westerners. Among the sources of conflict was the newly created national forest system, which removed more than 150 million acres from the public domain; the fledgling Forest Service stirred rancher resentment by beginning to charge fees for grazing in national forests. In 1913, 1914, and 1919, meetings of western governors passed resolutions asking Congress to transfer the remaining public land (outside the national forests) to the states.

In 1930, in the wake of another bitter conflict between ranchers and the Forest Service over grazing fees, a commission appointed by President Herbert Hoover recommended transferring the surface rights on federal lands to the western states. The states rejected the offer, however, saying that they did not want the

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surface rights unless they got the mineral rights as well.

Western resentments flared anew after the Taylor Grazing Act in 1934 imposed new controls on public land users, and in particular extended the system of grazing permits and fees to all public lands. After World War II proposals for major tenure changes emerged again, not just to transfer grazing lands to states—the thrust of a bill introduced in 1946 by Senator Edward Robertson of Wyoming—but also to provide for sale of such lands directly to rancher-users, in what would today be called privatization.

The recent Sagebrush Rebellion thus falls into a familiar pattern. Like past efforts, it was precipitated by a period of increasing federal control over public land users. Once again, the greatest irritant to westerners was controls on livestock grazing on public lands. Ranchers led the Sagebrush Rebellion as they had led previous movements. And the outcome was also similar: the federal government responded not by divesting the land, but by making management concessions to conciliate western interests.

The rebellion of the 1970s more or less began in Nevada, a state that has long shown a particularly strong interest in the question, no doubt because it is the state with the highest percentage of federal land ownership. In 1970 the Public Land Law Review Commission rejected a formal request by Nevada for a land grant of 6 million acres to be selected over twenty years, along with a similar request from Arizona. In 1976 a Nevada state commission urged the state attorney general "to assert, in the normal course of litigation, all possible claims the State of Nevada has to the public lands within its borders." Two years later the state legislature formally asserted a claim to public-domain lands within the state. Other western states joined in 1978 in forming the Western Coalition on Public Lands, for which the Nevada Legislative Counsel Bureau agreed to serve as a clearinghouse.

It was not until 1979 that the rebellion made it into the national headlines. In June of that year the Nevada legislature enacted the "Sagebrush Rebellion Act," which flatly declared the public domain lands in Nevada to be the property of the state, specified steps for state management of the lands, and provided support for litigation to achieve the purposes of the bill.

The legislature asserted in the bill that the vast extent of federal land holdings in Nevada —97 percent or more of five counties and 86 percent of the state as a whole—was unconstitutional. It based this claim on several legal theories, the most important being the "equal footing" constitutional doctrine, which requires that in certain matters affecting basic state sovereignty all states must be admitted to the nation on equal terms (see "The Fall of the House of *Usery*," *Regulation*, May/June 1983). Now, Nevada's basic sovereignty is surely reduced by its status as little more than some scattered urban islands surrounded by a sea of federal land. When Nevada gained statehood in 1864, so the state argues, it joined the Union on the implicit understanding that this insult to its sovereignty would eventually end: the federal government would dispose of its land holdings according to the practices of that time. (In most of the states admitted to the Union prior to 1864, the majority of federal land had in fact already been sold, homesteaded, or otherwise divested.) The subsequent federal decision to hold on to the land, Nevada claims, was an after-the-fact violation of the statehood agreement that left its sovereignty fundamentally impaired.

Thus far the courts, along with virtually all legal scholars, have rejected these arguments; even the Sagebrush rebels have not seemed to take them very seriously. No doubt it is partly the archaic sound of the claim, although long-ignored Indian treaties of 100 years ago (or more) have been dusted off and enforced. But more important, informed national opinion simply has not been convinced that it would be desirable on policy grounds to divest federal lands to the states.

After Nevada passed its "sagebrush bill," the legislatures of Utah, Arizona, New Mexico, and Wyoming followed suit in 1980. Sagebrush bills also passed the California and Washington state legislatures, but the California bill was vetoed by Governor Jerry Brown, and in Washington the voters turned down, in a later referendum, provisions on which the bill was contingent. Sagebrush legislation gained strong support and active consideration—if not final passage—in virtually every other western legislature as well.

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Candidate Ronald Reagan, for his part, said in the summer of 1980, "I happen to be one who cheers and supports the Sagebrush Rebellion. Count me in as a rebel." President-elect Reagan later promised, "My administration will work to ensure that the States have an equitable share of public lands and their natural resources."

Some western representatives in Congress began to lend a legislative hand. In 1978 Senator Jake Garn (Republican, Utah) introduced a bill authorizing the secretary of the interior to convey public lands to states that applied for them. In 1979 Senator Orrin Hatch (Republican, Utah) and Representative Jim Santini (Democrat, Nevada) introduced bills providing for cession to the states of ordinary federal lands.

In May 1981 Hatch and Santini again introduced land transfer bills, both of which required that lands be managed by the states under multiple-use principles. The Hatch bill applied to both BLM and Forest Service lands, while the Santini bill was limited to BLM lands. These Sagebrush legislative efforts, like the legal challenges, never made any real progress.

Political Co-optation

Many key western political leaders in fact embraced the Sagebrush Rebellion more as a symbol of western unhappiness with federal management practices than as a genuine policy proposal. They adopted the pragmatic and time-honored course of using the rebellion as an occasion to work for concessions in federal land management practices.

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One important westerner who held this view was James Watt. Asked at his confirmation hearings whether he favored large-scale transfers of land to the states, Watt replied:

> I do not think that is needed. That is not the first order of priority, certainly. What we must do is defuse the Sagebrush Rebellion.
>
> The Sagebrush Rebellion has been caused by an arrogant attitude by the Department of Interior land managers, who have refused to consult and include in their decision-making process State and Local governments and land users. The law says they must, I realize, and you have been an author of that type of legislation. Yet the fact remains that they have not. (January 7, 1981)

As secretary of the interior, Watt adopted what he called the "good neighbor" policy. It involved several elements. First, Watt sought to expedite a variety of "in lieu" and other land transfers to the states that had long been in the works but had never been completed, potentially involving up to 500,000 acres of land. Moreover, he announced, Interior would consider transferring other federal lands to western states on a selective basis if the states could identify specific reasons they needed the land. In many cases the lands would be transferred at a highly preferential price, although not for free. All these transfers could be accomplished within the limits of existing law.

Western governors eventually identified 973,000 acres that they were interested in acquiring. As of early 1984, the BLM had in fact transferred about 65,000 acres to states and local governments under follow-ups to the good neighbor policy. Direct BLM land transfers to the states under other procedures have equaled another 294,000 acres during the Reagan administration, a sharp increase over the rate of transfer of the 1970s.

Finally, Watt pledged to make federal land managers in the West much more responsive to western concerns and needs. Indeed, this latter effort was to prove highly successful in dissipating the momentum of the Sagebrush Rebellion.

The Rebellion Runs into Contradictions

The rhetoric of the rebellion suggested that federal land ownership was being forced on the western states by a domineering federal government. But the West long ago became politi-

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cally strong enough that, by taking a united stand, it could have successfully demanded transfer of the federal lands. The reality was that the West had until recently found the rewards of federal ownership to be worth the annoyances; in fact, it was still of two minds on the issue.

This reality set in when it came time to fill in the specific details of transfer proposals. Western ranchers, for example, benefit from the federal presence in various ways. Most important, informal understandings have evolved over fifty years or more that effectively give them the right to graze certain public lands at less than market rates. If the lands were transferred to the states, these arrangements would be up for renegotiation. What assurances would ranchers have that state land administrators would be bound by the de facto property rights embodied in past federal practices? Indeed, several western states now impose grazing fees on state-owned land that are significantly higher than federal grazing fees.

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Thus, when the government of Utah proposed "Project Bold," a large-scale exchange of state for federal land, it ran into opposition from the ranchers grazing on federal land. The *Salt Lake Tribune* reported in October 1981 that

> during their successful crusade for state legislation to take over all BLM lands, the "rebel" cattlemen denounced BLM land management practices and actual or threatened cutbacks in grazing permits. They contended the state could do a better job of management and Utah revenues would increase.
>
> However, in the Project Bold meetings, they opposed state takeover of the proposed BLM properties, voicing fears that the state, as new landlord, might not honor their present federal grazing permits.
>
> In a complete reversal, the feds are now the good guys and the state is apparently not to be trusted. For instance, a rancher at one of the meetings said, "BLM has been very cooperative and has put half of the revenue back into the land."

In New Mexico, where Sagebrush legislation was also enacted, one rancher complained in a letter to the *Albuquerque Journal* that

> the State Land Office has a philosophy of "optimizing the dollar return," all right. Dollars are the only language they speak up there. Any communication with them must be accompanied by a fee. Every year the high leases get higher with no consideration given to what is on the land that year or how many cattle can, or are, grazing on the land. If we had to pay as much to lease the BLM portion of our ranch as we do for our two sections of state land (which are some of the least productive on the ranch) we would go out of business.

It might seem odd that ranchers would not wield as much political clout in state legislatures as they do at the federal level. Of course, with the rapid population growth of the West, livestock interests have diminished in political power in state legislatures. Moreover, tapping the federal till often seems virtually costless, whereas western state budgets have come under close scrutiny after periodic taxpayer revolts.

Ranchers were not the only group with second thoughts about the rebellion. Mining interests also wondered what would happen to their easy access to land for mineral exploration, along with the huge number of existing mining claims on federal lands. State land administrators also might reverse the federal policy of free access and begin charging mineral royalties for gold, copper, nickel, and other "hardrock" minerals.

The other possibility—that states would continue to manage public lands as the federal government had done—raised a different sort of threat, this time to the budgets of the less wealthy states. Studies commissioned by Governors Scott Matheson of Utah and Richard Lamm of Colorado, among others, showed that the fiscal impacts on the states would be negative. Table 3 shows the fiscal situation in 1981, assuming for the purposes of analysis that the

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Table 3

REVENUES TO STATES FROM PUBLIC DOMAIN LAND
(thousands of dollars)

State	Net State Gain (Loss) from Transfer, All Land	Net State Gain (Loss) from Transfer, Surface Only
Alaska	$ (66,947)	$ (23,800)
Arizona	(15,115)	(15,882)
California	(4,089)	(25,193)
Colorado	(6,324)	(17,828)
Idaho	(23,025)	(42,821)
Montana	(9,815)	(14,855)
Nevada	(18,835)	(26,323)
New Mexico	107,328	(13,076)
North Dakota	43,629	35
Oregon	(6,106)	(4,352)
Utah	(2,411)	(18,040)
Washington	(878)	(739)
Wyoming	114,055	(11,469)
Total	$111,463	$(214,346)

Source: Robert H. Nelson and Gabriel Joseph, *An Analysis of Revenues and Costs of Public Land Management by the Interior Department in 13 Western States—Update to 1981*, U.S. Department of the Interior, Office of Policy Analysis, September 1982.

states would incur the same management expenses and reap the same total revenues on BLM land as the federal government. As the table shows, ten of the thirteen western states would have had to absorb added financial burdens, some as high as $10 million to $25 million per year. The adverse fiscal impact would be much greater if the federal government transferred only surface rights and kept its current share of mineral revenues: in that case, the thirteen western states would have experienced a new fiscal burden totaling $214 million in 1981.

Recreationists, unlike livestock operators and miners, did not have to reverse their original position to oppose the Sagebrush Rebellion; they had never supported it in the first place. But their opposition sprang from the same fundamental reason as that of the others. Hunters, hikers, and fishermen had free access to public lands under the existing system. Although the federal government has from time to time considered various proposals to charge fees on general recreational use of public lands, it has never adopted any of them. Who could say what would happen under state ownership? It might also prove to be simply a transitional stage on the way to private ownership. Even if it did not, recreationists might find themselves paying some market-clearing price or facing no-trespassing signs.

The responses of public land users to the Sagebrush Rebellion all had a common thread. Over many years, by dint of much political effort, these groups had won recognized entitlements to use parts of the public lands in certain ways. In some sense, they had established what amounted to property rights, some held individually, such as grazing rights, and others collectively, such as wilderness and other recreational rights. If they were to be persuaded to give up these rights, or at least subject them to new uncertainty in the rough-and-tumble of state politics, they would have to be shown some clear countervailing benefit from state ownership. The Sagebrush rebels were never successful in showing—indeed, hardly tried to show—that these benefits in fact existed.

Political movements need both interest-group support and an ideological base if they are to succeed. While the Sagebrush Rebellion had interest-group support, it never had a well-developed ideology. Leaders of the Sagebrush Rebellion could effectively rouse the troops, but they could not present a consistent theory to explain why state ownership would serve the broad national interest or the cause of fairness. Thus they could not rebut either the perception in the rest of the country that the rebellion mainly served the narrow sectional interests of the West, or the perception in the West that the rebellion would endanger the benefits the West traditionally has received from the rest of the country.

These circumstances reflected the absence of intellectual or academic enlistees in the Sagebrush Rebellion. For many people the rebellion appeared as an emotional, populist movement that could not attract the support of "serious" thinkers. In the end, although the Sagebrush rebels opened a useful debate in the West on land tenure, they did not persuade the region's opinion leaders or most of the key western members of Congress. Within the Reagan administration, a different cause—the cause of privatization—soon came to preeminence. ■

The second part of this article will discuss the movement for "privatization" of public lands in the West.

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More Money or Less Regulation?

Revitalizing Urban Transit

Robert Cervero

AIRLINES, RAILROADS, trucking, and intercity buses have all been deregulated in recent years, with bipartisan support and generally good results. Government is getting out of the friendly skies and off the busy roadways of this nation so that market forces can prevail. But although the cross-country rider now benefits from lively competition, the cross-town rider unfortunately does not. In most of our big cities, public transit users must deal with entrenched monopolies offering unresponsive services at standardized regulated fares. There is no reason why this should have to be so. Applying the principles of deregulation to urban settings could help solve some of the worst transportation problems plaguing our cities.

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The Urban Transit Mess

Those problems are all too familiar to most Americans. Traffic jams are daily rituals in many places. Moreover, roads and bridges are approaching the end of their design lives and falling apart, in large part because maintenance and rehabilitation have been routinely deferred. Public transit shares these upkeep and crowding problems. Several older subways are rapidly decaying, and in most large cities buses carry crush-loads in the rush hour but run half-empty the rest of the time. Transit has crippling financial problems as well. Few of our municipal bus systems recoup more than 40 percent of their operating costs from fares, saddling governments with most of the bill. Federal subsidies to public transit alone have grown from $132 million in 1970 (mostly small capital grants) to over $3.2 billion in 1982, a

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2,400 percent rise. Meanwhile, federal expenditures on highways increased only 93 percent, from $4.4 billion to $8.5 billion, with much of the gain eaten up by inflation. This shift in national policy reflected the view, shared by Republicans and Democrats alike, that public transit was "good for cities."

Despite this massive infusion of government aid, there has been little payoff to brag about. Nationwide, transit ridership has remained fairly stagnant at about 6 billion passengers a year since 1970. By comparison, urban highway travel has risen from 570 billion miles a year to nearly 1 trillion. The availability of subsidy dollars for public transit, many argue, has typically resulted in lax management, overly generous wage settlements, and the unbusinesslike expansion of services into low-density suburban markets. Public transit's outright legal monopoly in some cities, along with the large subsidies it receives, has tended to squelch competition from taxis, private commuter buses, and other alternative services of generally higher quality.

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In all likelihood, deregulation would do more to improve the quality of urban transportation and reduce the fiscal shortfall, in both the highway and transit sectors, than any other policy strategy. Perhaps the greatest appeal of deregulation lies in its potential for spawning a richer mix of services. When traveling in cities today, many Americans have at best only two alternatives to the private automobile—buses or taxis. The past decade, however, has taught us that fixed route, uniform-quality services—buses and subways—will not lure significant numbers out of their cars. Studies consistently show that commuters are far more sensitive to the *quality* of transportation than to its *price* and will give up their cars only if they can, say, dramatically reduce travel time or improve comfort. Factors such as door-to-door travel time, reliability of schedules, certainty of getting a seat, and temperature control are important determinants of what modes travelers choose. Travelers particularly hate to spend time walking to a bus stop, waiting, and transferring.

What is needed, then, is a wider assortment of urban transportation services targeted to the needs and travel desires of a fairly diverse urban America. Regulatory reform could bring this about by injecting a much-needed dose of competition into urban transportation, just as it has already done with the nation's airlines, railroads, and roadways.

Deregulating Taxi, Dial-a-Ride, and Jitney Services

The term "paratransit" is used to describe urban transport services that fall between those of the private automobile and the conventional bus. Taxis, dial-a-ride vans, and jitneys, which comprise one class of paratransit services, respond immediately to travel requests made by phone or curbside hail, and for this they charge a premium. By comparison, vanpools and commuter buses are typically prearranged and operate only between given points. Allowing all types of paratransit to operate freely is a necessary first step toward effectively dealing with today's urban transportation problems.

Taxis. All U.S. cities regulate taxis to some degree. While few observers question the propriety of regulating driver "fitness," the same cannot be said for controlling the number of taxis that operate in a city, the types of services they provide, and the rates they charge. Most cities restrict entry by fixing the number of licenses (medallions) granted, often on the basis of cabs per capita, but a handful of cities, notably Los Angeles and Chicago, achieve the same result by granting exclusive franchises to one or a few companies. Because of these restrictive practices, large fleets offering services of fairly uniform quality have become the norm in most big cities. Medallion and franchise cities more often than not have higher fares than cities that allow virtually unrestricted entry into the taxi market. In Washington, D.C., an unrestricted city that boasts more than thirteen cabs for every 1,000 residents (by far the highest ratio in the country), the fare for a typical four-mile

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trip is only about $2.75. By comparison, in New York City, where notoriously restrictive entry regulations hold the ratio to 1.7 cabs per 1,000 residents, the same trip would cost about $4.75. With high fares translating into high taxi medallion values ($65,000 or more in New York City), it is clear that the costs of monopoly privileges are being passed on to consumers.

Studies have found travelers to be more sensitive to the ready availability of taxis than to speed, comfort, or virtually any other service feature. Not only do cities with open cab entry have more than three times more cabs per capita than regulated ones, but services are often more closely integrated with local bus and rail services as well. Taxis have also proven their strength in low-density residential areas where public transit is highly unprofitable or uncompetitive. And in cities where individual owner-operators of cabs are allowed to ply their trade, marginal markets abandoned by large fleets and franchises are again being served.

Experiments with entry and fare deregulation in twenty-two U.S. cities over the past five years have proven quite successful. According to a recent Federal Trade Commission report, the number of firms and cab service hours have risen markedly since deregulation (*An Economic Analysis of Taxicab Deregulation*, May 1984). Moreover, fares have essentially remained unchanged (in inflation-adjusted dollars) and service quality has generally improved (in particular, shorter waits, fewer nonresponses to phone requests, and cleaner vehicles). Deregulation has been a particular boon to small taxi companies and to private individuals who were previously denied entrepreneurial freedom. Significantly, it has also increased employment opportunities for some urban residents, particularly among low-income and minority populations where joblessness is the highest.

Shared-Ride Services. In recent years, governments have been quite solicitous of carpools but have generally been reluctant to extend the ride-sharing concept to taxis by allowing them to pick up more than one party. Shared-ride taxis flourished in Washington, D.C., during World War II, when cab drivers displayed destination signs in their front windows and folks along the route would hail the cabs going their way. Riders got a break in fares, and scarce wartime resources were efficiently used. In 1974, Washington again adopted a version of ride-sharing, primarily in response to gasoline shortages.

To protect passengers against being overcharged when drivers deviate from a route to drop off other customers, a shared-ride system requires zoned fares rather than distance-metered ones. But for the system to work well, it is not necessary that all cabs operate on a shared-ride basis. Since some passengers would prefer to avoid even the modest delays caused when the cab picks up other fares, a mix of exclusive-ride and shared-ride taxis is the best way to satisfy the riding public's preferences.

Many cities already have public ride-sharing, in the form of governmentally subsidized dial-a-ride vans that provide curb-to-curb services for the elderly and handicapped. But demonstration projects in El Cajon, California, Davenport, Iowa, and some twenty other cities reveal that shared-ride taxis can provide the same sort of service at a much lower cost per passenger than these vans, largely because their drivers earn less (even though they carry more customers). In most of these places, a travel voucher program gives senior citizens, disabled persons, and poorer persons a choice of whether to travel by bus, shared-ride taxi, or dial-a-van. These user subsidies have proven to be an efficient way to underwrite the travel expenses of disadvantaged persons while also promoting healthy competition among different service-providers.

Perhaps surprisingly, shared-ride taxis have also turned out to be a blessing to local bus systems. Not only do they serve to feed passengers to bus lines and rail stations, they also siphon off some of the peak demand. This "peak-load shedding," as it is called, can result in real cost savings to public transit. Past studies consistently show that it costs two to three times more to run buses during rush hours than at other times, largely because restrictive union work rules require that drivers be paid time-and-a-half if they work during both the morning and evening peak. In Singapore, the program that limits the numbers and types of vehicles entering the downtown area during the daytime relies heavily on shared-ride taxis to absorb many of the displaced auto passengers, thus holding the public transit system to a

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much more manageable scale. In short, by supplementing bus runs at peak hours and serving senior citizens and disabled persons at other hours, a system of shared-ride taxis makes it possible to use vehicles more efficiently throughout the entire day.

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Jitneys. Jitneys extend the shared-ride concept by carrying up to a dozen passengers, usually in a station wagon, over a semi-fixed route on a fairly regular basis. Typically the operator picks up customers until the vehicle is full and makes only slight detours from a major street. Popular early in this century, jitneys were banned in most cities around World War I, victims of the trolley-operators' charge of "cream skimming" and unfair competition. Though jitneys may well have threatened city transit systems in 1920, a time when those systems were in their infancy and struggling to survive, they would actually benefit urban transit systems today by providing, as shared-ride taxis do, a much-needed supplement to peak-period capacity.

In many Latin American, Asian, and Middle Eastern cities, jitneys are the chief mode of urban transportation. It has been estimated, for instance, that they accommodate over half of the daily travelers in Caracas, Buenos Aires, and Istanbul. They are also enjoying a comeback of sorts in this country. Jitneys now operate legally in San Francisco, Atlantic City, and most recently San Diego, although local ordinances hold their numbers below 500 even in these places. And in Chicago, Pittsburgh, Baton Rouge, Miami, Chattanooga, and probably other cities as well, jitney services are in such great demand that drivers operate illegally. In Chattanooga alone, over eighty-five illegal jitneys serve 20 million willing customers a year. These clandestine operations generally thrive in low-income, minority communities where there is a demand for a hybrid service—half taxi, half bus. Authorities have tended to look the other way when confronting these illegal, yet sucessful, operations.

Recent Experiments with Taxi and Jitney Deregulation. Seattle, San Diego, and Portland (Oregon) virtually eliminated their restrictions on taxis and shared-ride services in 1979. All three either removed the ceiling on taxi permits or raised it significantly and, in addition, permitted ride-sharing in taxis and allowed exclusive-ride fares to vary. (The shared-ride services were priced on a zoned basis, except in Seattle, which retained metered rates with adjustments to prevent cabbies from penalizing customers when picking up extra fares.) San Diego legalized jitneys as well. Although taxi operators and the transit interests fought to preserve their entrenched positions in all three cities, strong city council and public support for reform ultimately prevailed.

By late 1983, the total number of taxi permits had increased by 128 percent in San Diego, 30 percent in Seattle, and around 12 percent in Portland. In all cities, there are now many more small cab companies and private owner-operators than before. In Seattle, for instance, the number of small fleets (those with four to thirteen cabs) rose from nine to twenty-three, whereas the share of cabs held by the three largest firms declined from 70 to 54 percent. More cabs have meant more service. Total weekly service in San Diego, for example, measured by cab hours of service, has increased 26 percent since deregulation. Decontrol has also led to greater market specialization, with the smaller and newer operators concentrating on hail and long-haul business and the larger and older companies going after the phone-request and package delivery business. Passenger waits at major cabstands have virtually disappeared in all three places. Average waits for San Diego's radio-dispatched cabs, moreover, fell from 10 to 8 minutes in the first two years of deregulation. In Seattle, price decontrol has also led to a variety of fare structures, including off-peak discounts and cut rates for repeat, advanced-reservation customers.

The experience with legalized jitneys in San Diego has been equally impressive. By early 1983 fifteen jitney companies, owning a total of forty-eight licensed vehicles and serving

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nearly 12,000 weekly customers, had entered the market. They operate on streets paralleling the new light-rail trolley system and main bus routes, concentrating mainly on commercial strips, military bases, and tourist spots, such as hotels and airports. San Diego's jitneys and shared-ride taxis can set any rates they want, up to a maximum, so long as they post them in two-inch lettering in the front window. Fares have proven to be a real bargain. A five-mile trip from the airport to downtown San Diego, for instance, today costs around $3 by jitney compared with $12 by exclusive-ride taxi.

In all three cities, the only major snag with deregulation to date has been isolated instances of price-gouging, especially at airports where tourists not accustomed to deregulated taxi fares were easy prey (on the Seattle case, see Richard Zerbe's article in *Regulation*, November/December 1983). All three responded by imposing fare ceilings on airport cabs. Also, last year San Diego, prompted largely by the bad press generated by the airport incidents, placed a one-year moratorium on new taxi permits to give the city council time to reassess the entire program. Overall, however, residents and visitors in all three cities have materially benefited from the specialization of services and the lower real prices made possible by deregulation.

Deregulating Vanpools and Commuter Buses

Vanpools and commuter buses—the paratransit modes that provide prearranged or book-in-advance commuting—have also been stifled by regulation, though perhaps to a lesser extent than taxis and jitneys. In the seventies, when vanpools first became popular, a number of state courts ruled that they were public carriers and thus subject to various certification requirements. Some even interpreted vanpools as illegal bus lines. More recently, several state legislatures, notably California's and Tennessee's, have exempted employer-sponsored vehicles that carry fifteen or fewer passengers from state regulation. All states permit voluntary, share-the-expense carpools, while most prohibit van services that are not related to employment and operate for profit.

Commuter buses are providing increasing numbers of subscribers with comfortable express service between their home communities and offices in a number of cities. Typically, however, commuter bus operators must prove their services are necessary and in the public interest before they may begin service. Even in the Los Angeles area, where the country's largest fleet of subscription buses carries over 5,000 daily commuters to work in comfort, transit authorities have succeeded in holding the number of runs below market demand. A recent study by the Southern California Association of Governments found that the Los Angeles area could save over $5 million a year by allowing subscription buses, which operate at about one-half the cost of public transit, to replace twenty-two local bus routes. Yet transit authorities have filed protests against a number of commuter bus applications.

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In 1982 Tennessee passed a law that could provide a useful model for relaxing controls on private bus operations. Within certain counties designated as "citizen transportation areas," Tennessee's public service commission now permits ordinary private vehicles to offer passenger services. Church and other special purpose buses are doubling as commuter vehicles in these counties. These reforms have provided vital travel alternatives to residents of small communities that have recently lost inter-city bus services.

Deregulating Parking

Another way to improve urban transportation conditions would be to relax zoning ordinances that require developers of new buildings to provide off-street parking. Typically, these ordinances mandate a minimum number of parking spaces per dwelling unit or per square foot of office space, the purpose being to ensure that traffic coming to a particular site can be adequately handled. The assumption seems to be that a certain number of workers "need" to travel by auto. Therefore, ample space must be provided.

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But parking ordinances present a number of problems. First, since they are in effect a tax on the quantity of floor space in a new building, they distort land markets. Indeed, this distortion may be increasing. Parking demand has declined with the rise in fuel costs and the switch to smaller cars—so that now, according to the Urban Land Institute, most shopping center developers will settle for up to 18 percent fewer spaces than heretofore. Yet most cities have been slow to modify their zoning ordinances in recognition of these factors.

Moreover, there is a somewhat disquieting "rule-of-thumb" air about many of these ordinances: some require much more parking than the private market would provide on its own, while others require less. One study, for instance, found that in California minimum parking-space requirements for a 10,000 square-foot office building vary from ten in Long Beach to eighty in Placentia. Moreover, local planning departments often bargain for more than the minimum number of spaces in negotiating with private developers, resulting in even greater variation in the supply of parking for comparable types of buildings and developments.

Third, by making parking artificially abundant, the ordinances have made it harder for public transit to compete for customers. Past evidence has generally proven that parking supply influences the travel modes people choose more than reductions in transit fares or increases in the frequency of bus service. In fact, it has become a standard axiom among urban transportation professionals that auto *disincentives*, such as parking bans, will relieve traffic congestion far more effectively than any assortment of public transit *incentives*. Furthermore, parking regulations may shift new development away from the built-up areas where public transit is competitive and toward lower-density areas where land for parking lots can be bought more cheaply. Thus, allowing developers to reduce on-site parking would strengthen transit systems in a second way: new development would be closer in as well as denser.

Recently, Seattle, San Francisco, and Portland (Oregon) have all lifted minimum parking requirements for new downtown developments. The total number of parking spaces has dropped by 2 percent in downtown Seattle since the late seventies, even as thirteen major new projects were being built. Other cities are reducing or eliminating off-street parking requirements for developers who agree to support transit or ride-sharing programs for their tenants. In both Los Angeles and Palo Alto, California, builders provide "effective alternatives to auto access," such as vanpool leasing and cash payments to transit agencies, again in return for less stringent parking requirements.

Other Candidates for Reform

A number of other regulations hamper progress in the urban transportation sector as well. Most American communities, for example, place a lid on the allowable density of various types of land uses, the purpose being to comply with regional land-use goals and to ensure that excessive demands are not placed on local sewer, water, and road facilities. In addition, suburban governments generally encourage the provision of ample roadway capacity and off-street parking, often as a precondition to approving a new subdivision. Local planners also tend to recommend that a planned subdivision be made less dense whenever studies suggest the project will generate more traffic than the nearby roads and intersections can handle.

The problem with this low-density bias is that it precludes the development of the customer base needed to support public transit and ride-sharing alternatives to the automobile. Modifying local ordinances to allow public officials greater flexibility in setting residential densities could prove to be a tremendous inducement to better transit over the long run.

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Finally, controls having perverse effects on urban transportation have also come from the federal level. In particular, the federal government has directly contributed to transit's financial dilemma through various requirements (often tied to subsidy programs) that effec-

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tively increase the costs of local transit services. Most notably, section 13(c) of the amended Urban Mass Transportation Act of 1964 provides that transit employees must not be adversely affected by any program involving federal grants. This stipulation has been blamed for encouraging overly generous wage settlements by giving labor a virtual veto power over federal transit grants. Section 13(c) has also helped unions secure contract clauses that guarantee workers forty hours a week pay even if they actually work less and that prohibit the hiring of part-time employees. Moreover, 13(c) has been used to keep public transit's competitors out of the market. In Norfolk, Virginia, for instance, unions sued under 13(c) when the local transit agency turned unproductive routes over to a private dial-a-ride operator.

Similarly, the Davis-Bacon Act, which requires that the prevailing wage level (in practice, union wages) be paid on federally funded construction projects, has also increased costs. Two of the best-known recent instances of this are the new rapid rail systems of Washington, D.C., and Atlanta. With labor expenses accounting for roughly 70 percent of the cost of operating most U.S. transit systems, the fiscal consequences of these laws have been substantial.

Overcoming Resistance

Regulations governing urban transportation have been built up, layer by layer, to the point where they are now a major barrier to innovation. Reform is needed to create a freely competitive transportation marketplace in our cities.

Admittedly, however, deregulation could have some adverse effects. For one, certain groups might suffer, particularly if public transit services were replaced by paratransit on a wholesale scale. A shift toward higher quality services priced at premium fares might be expected to increase travel options for affluent residents while perhaps diminishing them for poorer city residents. It is also possible that some carriers might pursue exclusionary practices and some cabbies might refuse to serve minority neighborhoods. To date, however, there is no evidence that that is happening in cities where taxis have been deregulated. Moreover, the fare reductions that result from taxi deregulation can be expected to benefit the poor most, because they spend a larger share of their income on taxis than other groups. User subsidies could also be introduced to help cover the travel costs of low-income persons. Overall, it would seem more likely that a deregulated environment would offer all Americans, regardless of income, a richer assortment of travel options than they now have.

The relaxation of entry restrictions on taxis and shared-ride services would also impose some inequities on medallion owners, some of whom have paid as much as $65,000 for their licenses. A municipality might buy back all medallions at their purchase price, although that would require a substantial cash outlay. Still, it would make sense to provide some compensation for those who paid the prevailing medallion prices under the previous regime of limited entry.

Decontrol of entry might also undermine transit services along corridors where a natural monopoly exists. However, past research has consistently shown that, with the exception of electrically powered operations (trains and trolleys), most transit services operate under conditions of constant returns to scale. Thus, the natural monopoly argument for regulating entry would seem to have limited application. Surely the benefits of deregulation would on balance far offset any detrimental effects a few transit systems might experience from heavy competition.

No assortment of technological fixes could do as much as deregulation to relieve congestion, strengthen public transit, and improve the quality of central cities.

In sum, there seem to be very few reasons for imposing price and supply controls on taxis, jitneys, club buses, and parking, and quite a few reasons not to. What is needed, today more than ever, is a freely competitive transportation environment in which the traveling public can enjoy a mix of service and price options. No assortment of technological fixes could do as much as deregulation to relieve congestion, strengthen existing public transit systems, and improve the quality of life in America's central cities. ■

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Readings
of particular interest

Industrial Pollution: Strategies to Minimize Damage

Targeting Economic Incentives for Environmental Protection by Albert L. Nichols (Cambridge: The MIT Press, 1984), 189 pp.

Economists have long argued that environmental regulators should rely less on "command-and-control" standards, such as those that require uniform reductions in emissions at each smokestack, and more on methods that create economic incentives not to pollute, such as emission fees and marketable emission permits. On this view, incentive schemes promote efficiency by allocating emissions reductions among sources in the least costly manner.

The efficiency of environmental regulation, however, depends not only on its choice of instrument (standards vs. incentives) but also on its choice of targets—whether it attempts to reduce emissions as such, or the damage that emissions do. Albert Nichols of Harvard University (now on leave as Director of the Economic Analysis Division in the Environmental Protection Agency's Office of Policy, Planning, and Evaluation) argues in this book that scholars and practitioners should shift their attention from emissions to damages, and reconsider various instruments in the light of their ability to reduce damages (as opposed to emissions) at least cost.

Nichols starts with a review of the relative advantages of different types of incentives. No system allows regulators to know in advance both the overall level of emissions and the marginal cost of control that will result. Auctions of marketable permits hold the former to a known level and allow the latter to vary; emissions fees do the reverse. Both schemes increase efficiency in at least two ways, aside from allocating pollution reductions to the sites with the lowest marginal costs. First, they alter the prices of final goods to reflect the external costs associated with their production. Second, they generate revenues that can be used to displace conventional tax levies (with their distortive effects).

If there is uncertainty about how much damage emissions cause, it will be difficult to choose the correct level for a fee. But it will be equally difficult, under such uncertainty, to select the correct emissions standard or number of permits. Whether marketable permits or fees are more efficient depends on the rates at which marginal costs and damages change with emission levels. If damages increase more than proportionally to emissions, marketable permits may be superior. Nichols argues that for many pollutants damages appear to be roughly linear over the relevant range, while marginal costs typically rise rapidly as control levels increase. This implies that fees will tend to be more efficient means of controlling such pollutants because they are more sensitive to marginal costs of control.

On the targeting problem, Nichols notes that damages usually result from a multistage process in which there are numerous potential targets for regulation, ranging from inputs (such as the sulfur content of coal) to the end points of concern (such as the number of cases of cancer). If incentives are used, efficiency argues for selecting a target as close as possible to the end point. A later target, such as health effects, offers two advantages over an earlier target, such as emissions. First, it provides an incentive for firms to exercise all the damage-reducing options within their power. Second, it ensures that the marginal cost of reducing damages, not just emissions, will be equalized across sources. If nonmarket standards are used, however, the optimal target is less clear. A rigid ceiling on the damage each firm may do, while allocating control efforts efficiently within firms, may lead to even more inefficient allocations across firms than a ceiling on emissions or inputs.

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As an example of the choice between targeting emissions and exposure in regulating health-threatening pollutants, Nichols explores the case of benzene emissions from maleic anhydride plants, which were the subject of an EPA standard proposed in 1980 and withdrawn earlier this year. Like other regulatory agencies, EPA generally assumes that the public-health risk posed by cancer-causing chemicals such as benzene is proportional to total population exposure. Primarily because of differences in population density, however, the total human exposure per unit of benzene emitted varies by a factor of fifty from one maleic anhydride plant to another. The marginal costs of control also vary, though not by as great an amount.

The author first analyzes the general problem with the aid of a mathematical model. Using specific functional forms for the costs of control and for the distributions of costs and marginal damages, he compares the efficiencies of several combinations of targets and instruments. In all cases, the charge levied on exposure, which is sensitive to differences among plants in both marginal costs and damages, is the most efficient approach, often by a large margin. The rankings of the other alternatives depend on several factors, including the curvature of the cost function, the relative variances in marginal damages and costs, and the correlation between costs and damages. In many cases, standards that are sensitive to variations in exposure (that is, are tighter for high-exposure plants) are more efficient than a uniform emission charge that ignores population exposure, even though the latter, unlike the former, is responsive to cost differences.

Nichols then turns to the specifics of showing how an exposure charge could be set and implemented for benzene. Although he is skeptical that any regulation in this case would produce more benefits than costs, he offers evidence that an exposure charge would be substantially more efficient than the uniform standard that EPA proposed. Smaller, though still significant, efficiency gains also could be achieved by applying standards only to high-exposure plants or by imposing a uniform emissions charge instead of a uniform standard. These strategies are less efficient than exposure charges, however, when cost estimates are inaccurate or when conditions are changeable, Nichols says. The maleic anhydride case illustrates the problem of uncertainty, he adds; conditions changed after EPA proposed its standard.

The fifty-fold variation in the exposure to benzene emissions from maleic anhydride plants is far from unique: analyses of other pollutants show even larger differences in exposure from plant to plant. These differences in marginal damages, Nichols argues, imply that there could be major efficiency gains in developing better targets than emissions, whether the instruments employed are the incentives favored by most economists or the standards that continue to dominate U.S. environmental regulation.

Trouble in the Regulated Nursery

"Unintended Consequences: Regulating the Quality of Subsidized Day Care" by Susan Rose-Ackerman, in *Journal of Policy Analysis and Management*, vol. 3, no. 1 (Fall 1983), pp. 14-30.

In the period between 1958 and 1977 the proportion of preschool children of working mothers cared for by persons outside the family rose from 31 percent to 48 percent. While this percentage includes "informal" suppliers—babysitters who come to the home or women who look after a few children in their homes—the number of formal day care centers also rose from 4,400 in 1960 to 18,300 in 1977. By 1979, 800 million dollars of state and federal money were being spent on day care. About 78 percent of this total went to organized centers, which cared for 61 percent of the children receiving subsidies.

For some years the federal government maintained a set of regulations intended to ensure the quality of day-care centers that received federally subsidized children. However, according to Susan Rose-Ackerman, professor of law and political economy at Columbia, the regulations could have had detrimental side effects. "The federal government's retreat from regulation in 1980 and 1981 may have had results that—even if unintended—were in many ways salutary."

The Federal Interagency Day Care Requirements (FIDCR) were developed by a

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group of federal agencies in 1968 and incorporated by Congress in modified form into law in 1975. The rules set requirements for such matters as child-to-staff ratios, group sizes, safety, and cleanliness. "The FIDCR also established requirements for food service, medical examinations, social service provision to families, parent conferences, and parent advisory councils."

Not surprisingly, these rules, if strictly enforced, would have driven costs up, and day-care providers expressed widespread discontent. The child-to-staff ratios, in particular, were generally much more stringent than the equivalent state licensing regulations had been. Thus, in response to the complaints of providers, Congress suspended the child-to-staff ratios pending a study of the feasibility of the FIDCR. The other provisions were meant to be enforced. In 1980 the federal administrators softened some of the requirements and eventually, as part of the block grants program, they were suspended entirely. The law now requires only that federally subsidized centers comply with all state and local regulations.

Federal regulation of subsidized day-care centers has several disadvantages, the author says. First, and most obviously, "a program with a fixed budget will benefit fewer children as regulations are made more stringent." Second, reimbursement rates may not be high enough to compensate centers for the added cost of the federal requirements—leading some centers to turn down subsidized children. Alternatively, centers that take subsidized children may face incentives to take more and more of them, since as the regulations push up their cost per child, unsubsidized families tend to pull out. The director of one charitable nursery reported to the authors of one study: "The welfare department will pay $40 a week for every child which they send, but I have to prove I'm spending $40 on all my other children. The board can't see how we manage unless we take only welfare children. This will solve our financial problems, but we don't want to offer a segregated program." In fact, 40 percent of the nonprofit centers that accepted subsidized children had their entire budget paid by public subsidy. While federal regulations are obviously not the only reason stratification occurred, they did, the author argues, make "increased segregation likely."

All of these concerns suggest, the author says, that—pending the evaluation of vouchers and other innovative strategies—"unsubsidized and subsidized clients ought to face equivalent regulations." Given "the federal government's limited resources and the desirability of encouraging the integration of children by income level, the policy of following state law appears to be a sensible second-best accommodation."

Adding Balance to Additive Regulation

"Food Safety: Revising the Statute" by David A. Kessler, in *Science*, vol. 223, no. 4640 (March 9, 1984), pp. 1034-1040.

When Congress last amended the Food, Drug, and Cosmetic Act nearly twenty-five years ago, most experts believed that it was possible to remove all carcinogens from the food supply. Today, the Food and Drug Administration (FDA) and many other observers see this goal as unrealistic. In the first place, the technology of analysis has advanced greatly, so that scientists now can identify smaller and smaller traces of carcinogenic substances. In addition, according to David A. Kessler, "contemporary toxicological testing suggests that an array of nutrients may play some role in the carcinogenic process." This change in perspective has created a need to reform the existing statute, says Kessler, who is a consultant to the U.S. Senate Committee on Labor and Human Resources and serves as special assistant to the president at Montefiore Medical Center in New York City.

The author says the FDA has had to interpret the statute in novel ways to avoid conclusions that a rigid reading might yield. An example is the agency's handling of selenium, an element that is essential for normal growth and metabolism but that also has been discovered to cause tumors in test animals. Normally the Delaney clause, which prohibits the use of any substance that induces cancer in animals or humans, would force a ban on selenium. To avoid this prospect, the FDA adopted a "novel and unproved theory" to justify its failure to apply the clause in this case. Kessler warns that

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the statute may be forcing the agency to sacrifice the predictability and consistency of the law to obtain desired outcomes.

Current law prevents the FDA from balancing risks sensibly in other ways as well. It may not, for instance, consider the possible health benefits of a food additive, such as the possible benefits of saccharin for diabetics and dieters or of nitrites in preventing botulism. If a useful substance is forced off the market and replaced by a less-studied substitute, health risks could increase. Moreover, the author says, if the agency is forced to pursue trivial risks, it may be distracted from serious risks: "the nation's capacity for toxicological testing is limited to a few hundred compounds a year."

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The complexity of the law, however, makes any revision difficult. The Food, Drug, and Cosmetic Act defines nine major categories of substances, which are not mutually exclusive. It applies a different regulatory approach to each category. The distinction between naturally occurring injurious substances and those that are "added"—which are held to a stricter standard of safety—dates back to the first federal food law, the Pure Food and Drug Act of 1906. The National Academy of Sciences' Food Safety Panel has recommended that a single standard of risk should be applied to all the different categories.

The author cautions that even though "the temptation is to view this system as an irrational patchwork," the "temptation should be resisted; although this law is insufferably complex, most of the distinctions it makes are fundamentally sound." The distinctions between substances based on how they enter the food supply (such as additives vs. natural constituents vs. environmental residues) reflect in part the limitations on the FDA's ability to control exposure. Other categories reflect "a judgment concerning the practicality of imposing a premarket approval process, the amount of data likely to be available, the likelihood of a proponent for the substance who could assume the burden of toxicological testing," and so on.

A number of possible revisions of the Delaney clause have been proposed short of full repeal. One would turn the clause into a rebuttable presumption against use of an additive found to cause tumors in animals. Another would allow leeway for additives that are "essential constituents" with a "long history of use" in the production of specific foods. A third would exclude some categories of regulated substances from the scope of the clause, such as, for example, packaging materials or substances with benefits. Any such excluded categories would be regulated under the general safety provisions of the act.

If the agency fully incorporates benefits into its risk assessment, however, the regulatory process could drag on for much longer than under the present system, the writer says. Benefits assessment might thrust value judgments on the FDA that Kessler believes are better left to Congress, such as whether health benefits only should be considered, or whether regulators should also take into account the effects of their restrictions on the price, abundance, variety, and consumer appeal of the food supply.

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Do Corporate Takeovers Keep Managements Lean?

"An Analysis of the Effect of State Acquisition Laws on Managerial Efficiency; The Case of the Bank Holding Company Acquisitions" by Christopher James, in *Journal of Law and Economics*, vol. 27 (April 1984), pp. 211-226.

Do corporate managers behave in the best interests of their stockholders? The answer may depend on how efficient the mechanisms are by which the stockholders can replace the managers. Recent writers have theorized that there is, in effect, a market for corporate control in which management teams compete for the right to manage corporate enterprises. In a well-functioning market for corporate control, if an incumbent management team behaves inefficiently, a competing set of managers will find some way to take its place. The more competitive this market for management is, the more it protects the interests of stockholders.

Corporate takeovers are one of the key ways stockholders change managements. It is not obvious, however, that their function is irreplaceable. After all, other ways of enforcing managerial efficiency are available too. The possibility of a proxy fight for control is one such spur; internal competition with other executives in the same firm is another. These alternative control mechanisms might be highly effective by themselves in protecting shareholder interests, and might conceivably involve lower transaction costs than the takeover process. That would make the takeover mechanism redundant as a spur to efficiency—undercutting an important argument for allowing wide leeway in corporate takeovers.

In this paper, Christopher James of the University of Oregon empirically examines the role of takeovers as a separate and distinct disciplinary device for managers. He compares the performance of banks operating in two sets of states. One set consists of states whose statutes prohibit the acquisition of a commercial bank by any other corporation ("nonacquisition states"). The other set consists of states that have no statutory impediments to bank acquisitions ("acquisition states").

The study examines expenditures by management on salary and on office and occupancy expenses for banks operating in each of the two sets of states. These expense items were analyzed because they are commonly thought to be associated with managers' consumption of material perquisites, or "perks." If the threat of takeover is an important disciplinary device for managers, then bank managers should be less subject to shareholder control, and should consume more perks, in states where no such threat exists because the law prohibits corporate acquisitions of banks. If, on the other hand, the other control devices available to shareholders are perfect substitutes for corporate acquisitions, then there should be no difference in the consumption of perquisites between the two sets of states.

An analysis of 580 banks in the two sets of states revealed significant differences in performance consistent with the hypothesis that takeovers provide an important safeguard for stockholder interests. Banks in nonacquisition states had significantly higher levels of expenses than did banks in acquisition states. "The evidence therefore suggests," James concludes, "an important and separate role for corporate takeovers as a disciplining device for managers." The evidence also suggests, he adds, that removal of state and federal restriction on acquisitions in banking could result in substantial efficiency gains by promoting a more active acquisition market.

Urban Renovation and the "Displaced" Tenant

Revitalizing America's Cities: Neighborhood Reinvestment and Displacement by Michael H. Schill and Richard P. Nathan (State University of New York Press, 1983), 184 pp.

For large old American cities confronting serious economic and social problems, the most hopeful development of the last two decades has been the revival of many close-in urban neighborhoods. Declining residential and commercial buildings have been rehabilitated; cities are succeeding in retaining some of their higher-income residents, instead of losing them to the suburbs, and to a minor extent have even been able to attract suburbanites back to the city. The upgrading of these neighborhoods has strengthened the economies of the cities and

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has also helped to alleviate the fiscal difficulties of their governments.

In Washington, however, the major political response to this unexpected urban revival has been to deplore its undesirable side effects. Public policy has focused on preventing or alleviating the displacement of the original residents of the neighborhoods, even to the point of impeding the revitalization process itself. In 1978 Congress stated that displacement should be minimized, not only in federal housing and community development programs but also in neighborhoods where revitalization is privately financed. The next year, the U.S. Department of Housing and Urban Development issued regulations that required cities as part of their local community development programs to develop strategies to help those who were displaced to find acceptable housing. After protests from the cities, the regulations were withdrawn by the Reagan administration in 1981. The image of a generalized social problem persists, however. At the local level, many city governments have passed laws that regulate property ownership and transfer in an effort to slow "gentrification." Washington, D.C., Philadelphia, and New York all restrict condominium conversions; Washington has a special tax designed to discourage "speculation."

At the same time, a few analysts have begun to investigate the actual nature and extent of displacement. Michael Schill, formerly of the Princeton Urban and Regional Research Center, and Richard Nathan, director of the center, conducted the largest survey yet undertaken of people who have in fact been displaced. They identified nine neighborhoods in five cities that were going through the early stages of revitalization, and were able to locate and interview over 500 renters who had moved out of these neighborhoods in 1979 or 1980. All nine neighborhoods were low-income before revitalization began, but they were otherwise quite diverse; four were predominantly white (one Hispanic), three predominantly black, and two mixed; some blue-collar, others with high concentrations of elderly residents or families on welfare.

Schill and Nathan found that displacement in these neighborhoods was not extensive. About 23 percent of those who moved did so involuntarily. The most common reason for moving voluntarily was a change in housing preferences or household composition (marriage, divorce, a new baby, and so forth). They conclude that "the popular image of the displaced outmover is grossly inaccurate. That image is of the outmover as either elderly or part of a nonwhite household (or both), afflicted with ills that range from having to pay unaffordable rents for substandard units to suffering from severe depression." In contrast, Schill and Nathan found that displaced households were usually better housed, in better neighborhoods, after they moved. They were typically poorer than other movers, and were disproportionately composed of Hispanics, the unemployed, single people, and women with small children, but not the black or the elderly. Most of these findings are consistent with the small body of earlier research that has been done on displacement.

Based on the survey, the authors argue that "the revitalization of inner-city neighborhoods should be welcomed rather than discouraged." They do not dismiss the problem of displacement, however; they note that displaced persons paid higher rents after moving, and that a small fraction were worse off, subjectively and objectively. To alleviate such problems they recommend "positive measures to reduce barriers to mobility"—specifically, various subsidy programs to enable low-income households to continue living in reviving neighborhoods, to help them relocate, and to provide more low-income housing.

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(Continued from page 4)

The means by which the EPA approached the matter of substitutes for EDB is also an appropriate subject for criticism, although Havender appears to have reached one of his conclusions on this matter with the same impetuosity which he rightly condemns in the agency. For example, one of his footnotes cites a recent study from the Netherlands from which he concludes that methyl bromide—which EPA proposed as an alternative for one of the uses of EDB—"is indeed a carcinogen, with a potency similar to that of EDB." In fact, when methyl bromide was given to rats by gavage, tumors developed in the forestomachs of the animals, but there were no tumors remote from the site of administration as there had been in the EDB study. Tumor development remote from the site of administration is highly significant in assigning the label "carcinogen" to a substance for purposes of risk estimation. The authors of the article themselves denied the applicability of the study for risk estimation purposes.

EPA is required to evaluate alternatives when it considers banning a pesticide. Unfortunately the agency too often considers the absence of toxicity data for the alternative to be the regulatory equivalent of negative data. I think this is the point Havender was trying to make. It is an appropriate one and has significant implications with respect to the public's exposure to unknown risks.

Of course, public and political pressure can lead any regulatory agency to respond impetuously, and Havender deserves credit for attempting to show some of the fallacies that can result. I am afraid, however, that the problem ultimately lies not with the public or the politicians, but with the scientists (the Pogovian "us"). We are asked to inject the analytic dispassion of science into the political process of regulation. A disturbing trend is developing in the opposite direction—that is, the politics are modifying the science and critical judgment is suffering.

Sorell L. Schwartz,
Department of Pharmacology,
Georgetown University

TO THE EDITOR:

I think your readers should know that Havender "bills" himself as a consultant to the American Council on Science and Health. This industry-backed organization promotes a number of "scientific" claims on behalf of its "clients," such as the claim that formaldehyde, high cholesterol, and junk food are harmless.

Havender's assertion that I recommended using marigolds as a substitute for EDB as a grain fumigant is patently absurd. In fact, I recommended and continue to recommend the use of carbon dioxide as a nontoxic alternative to EDB grain fumigation. Specifically, it has been demonstrated that maintaining a 60 percent carbon dioxide atmosphere in a storage bin at or above 60 degrees Fahrenheit for at least four days affords a cost-effective, nontoxic alternative to chemical treatment.

Hugh B. Kaufman,
Environmental Protection Agency

TO THE EDITOR:

Havender's article does not accurately portray EPA's decision to issue an "emergency" suspension of EDB sold for use in grain fumigation. He suggests that this action was not warranted because potential EDB residues in grain-based consumer goods pose very little short-term risk so that there is no "emergency." In fact, the agency's public statements have emphasized the health risks posed by long-term exposure to EDB, and our actions are designed to eliminate these risks in an orderly manner. EPA agrees that grain products on store shelves are not a significant short-term health hazard and that the risks from EDB do not make these foods unsafe to eat.

The agency's emergency suspensions of EDB grain and soil fumigation products were based on federal pesticide law, which provides for emergency suspension to prevent an "imminent hazard," defined as "a situation which exists when the continued use of a pesticide *during the time required for cancellation proceedings* would be likely to result in unreasonably adverse effects" (emphasis added). The agency estimated that the appeals of our decision to cancel EDB grain fumigants would result in hearings that could take two or more years. We believe that two or more years of continued unrestricted use of EDB in grain products posed unreasonable and unnecessary risks to public health. Similarly, the emergency suspension of soil fumigants was intended to prevent further contamination of ground water, which has occurred in parts of five states.

EPA does not agree with the author's view that the risk of cancer posed by exposure to EDB is insignificant. Given the current limited state of knowledge about the causes of cancer, animal studies are the most realistic indicator available of carcinogenic risk. There is persuasive evidence that EDB is a potent animal carcinogen. EPA recognizes the uncertainties involved in extrapolating from animals to humans and discussed these limitations in the documents supporting each EDB decision. However, we feel it is a mistake to assume that animal risks do not pertain to human beings or that there is a specific threshold dose below which the risk of cancer disappears. This is particularly true in the case of EDB, where all studies, involving several species, both sexes, three routes of administration, and high- and low-dose groups were all demonstrably positive for tumors.

Several other points should be noted. The human exposure studies Havender mentions were reviewed by the agency's Carcinogen Assessment Group and found to be so seriously flawed that they could not be used in regulatory decision making. The EDB atmospheric standard of 130 parts per billion for workers established by the state of California is indeed higher than the dietary exposure that EPA estimated. However, occupational exposure is calculated for a forty-year work life, eight hours per day, five days a week, for a relatively small group of people. EPA's actions were based on the potential risks of lifetime (seventy-year) dietary exposure for the entire U.S. population.

The author attempts to play down the risk posed by EDB because there are other cancer risks that are higher. The logic of this position is elusive, to say the least. In the case of cigarettes, the public can affect its level of exposure in ways other than regulation. Although there are many naturally occurring carcinogens, EDB differs in that it is subject to regulatory action that can eventually eliminate exposure. That there are other hazards is no reason not to take action on this one.

Finally, the author is in error in stating that the agency has not examined the toxicity of the alternatives to EDB. In fact, they were discussed at three separate locations in the September 27, 1983, position document, the same document that Havender says does not discuss the toxicity of the alternative pesticides. He is also in error in saying that

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the carcinogenic potential of aluminum phosphide has not been studied. It has been studied, and the results are negative. It is true that methyl bromide and carbon tetrachloride are under review as potential carcinogens, and EPA is requiring additional data on these and the other alternative fumigants in order to assess potential risks. Again, these uncertainties do not warrant failing to act to reduce the more clearly established risks of EDB.

John A. Moore,
Assistant Administrator for Pesticides and Toxic Substances, Environmental Protection Agency

WILLIAM HAVENDER responds:

I share Dr. Sorell Schwartz's doubts about the concentration of tumors in the forestomachs of the test rats in the EDB study. Other questions could be raised as well about the study. For instance, the high mortality of the subjects suggests that the maximum tolerated dose was exceeded. But current concepts of cancer regulation recognize no such qualifications, and I wish Schwartz well if he wants to persuade regulators otherwise.

John A. Moore argues that an immediate ban on EDB was justified because the prospect of its continued use during two or more years of hearings was intolerable. This claim cannot be reconciled with the agency's own numbers. Last fall EPA estimated that uncontrolled use of EDB would lead to three extra cases of cancer per thousand exposed persons over a lifetime. It said that this level of risk, while intolerable for the long term, did not warrant an emergency ban. On February 3 of this year, the agency changed its mind and announced that it would ban EDB immediately because of new data on supermarket samples. One might assume that the new data would show the hazard to be greater than EPA had thought last fall. But in fact, EPA had lowered—yes, *lowered!*—its estimate of public hazard by well over tenfold. Only the Red Queen would understand how a huge decline in estimated risk could create an emergency.

In the document of February 8, explaining its decision, EPA said its interim standard was not sufficient because it left adults with an estimated lifetime risk, from two to three years exposure under the interim standard, of somewhere between one cancer case in a million and one in ten million. Most students of regulation consider risks in this range to be negligible. Pepper is thought to pose one hundred to one thousand times as much carcinogenic risk, based on EPA's new numbers. I disagree with Dr. Schwartz that it is "specious" to point out the amounts of EDB people actually ingest; it is central to putting the degree of EDB's risk in perspective. Potency is a legitimate issue, but I spent much of my paper explicitly discussing it.

EPA's reasons for dismissing the human exposure studies are obscure. In particular, the agency described one of the studies as "technically acceptable" and concurred that it showed no "statistically significant cancer increase in exposed workers." The agency's primary objection seemed to be that only 156 workers were studied, but that number was large enough to test EPA's estimate of the potency of EDB. As I noted, EPA did not discuss or even refer to a 1979 study by Ramsay *et al.* that had already investigated this issue and showed that EPA's estimates were at least ten times too high.

Concerning EPA's rejection of the California worker standard, most toxicologists feel that lowering a worker standard by a factor of ten is adequate to allow for sensitive groups in the general population, including the very young, the elderly, the ill, and so on. In this case, the general-public standard was set below the worker standard by a factor of a thousand and now, since EPA revised its estimated exposure levels, by a factor of more than ten thousand.

We next turn to Moore's discussion of how EPA compared the risks of EDB to those of its alternatives, aluminum phosphide, methyl bromide, and carbon disulfide. As he says, EPA's earlier report discussed the toxicity of EDB's primary alternatives. What it failed to mention, as I pointed out, was that it did not know much about the potential *carcinogenic* properties of those alternatives—a crucial omission, since it is precisely EDB's carcinogenic hazard to consumers that prompted the agency to act.

Moore claims that aluminum phosphide has been studied and is not a carcinogen. There is only one test that he might have in mind—one in which animals were given not aluminum phosphide, but rather food that had been pretreated with it and contained trace residues at a level of about one part per million. It is not surprising that such minute doses yielded no tumors; EDB itself would pass such a test. As I pointed out in my article, the relevant consideration is whether EDB's alternatives have been subjected to the "same sort of long-term, high-dose animal cancer tests" as EDB.

Let me reassure Schwartz that in applying EPA's own methodology to methyl bromide I did not wish to endorse that methodology, just to show that by EPA's own criteria methyl bromide is a carcinogen with a potency comparable to EDB. Schwartz is correct that the Dutch study on methyl bromide showed no tumors at distant sites. But the EDB test ran for forty-nine weeks, nearly four times as long as the Dutch test. Since distant tumors result from a process not requiring local irritation, they may take longer than three months to develop. Thus there is no necessary contradiction between the two experiments.

Moore's admission that EPA is still trying to figure out the hazards of EDB's alternatives concedes my main point: that EPA did not know enough about the carcinogenic risks of the alternatives when it imposed the ban. In short, the agency is playing dice with the nation's health.

I am not a consultant to the American Council on Science and Health, but a member of its Board of Scientific Advisors, as are a hundred other scientists across the country, all of whom serve without pay and none of whom are employed by industry. Hugh Kaufman's insinuation that the council accepts industry "clients" and develops scientific positions in conformity with their wishes is simply absurd. If Kaufman has cogent scientific objections to any of the council's positions on consumer issues, he should state forthrightly what they are, not rely on innuendo.

Kaufman correctly states that he was not recommending the use of marigolds as a grain fumigant. As I wrote, he was recommending them to control nematodes in citrus groves instead, a use for which they are equally ill-suited. (The topic arose, however, in a debate in which I pressed Kaufman to come up with safe grain and spot fumigants, and marigolds were the first thing he mentioned.) To be fair, Kaufman did later endorse carbon dioxide as a replacement for EDB. But carbon dioxide has so far not achieved any significant usage by industry, for three good reasons: it is useless for spot fumigation, huge quantities are needed, and it requires airtight storage facilities in order to main-

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tain the necessary 60 percent concentration for four days. Since most existing grain storage bins (not to mention milling machines) were not built to be airtight, one must question Kaufman's assurances that carbon dioxide is cost-effective.

Persian Gulf Oil

TO THE EDITOR:

We would like to make a correction in our article "The *Next* Oil Shock—Giving the Market a Chance" (*Regulation,* March/April 1984). In the first full sentence on page 17, the word "world" was inadvertently substituted for "Persian Gulf." The sentence should read: "A 50-percent reduction in *Persian Gulf* oil supplies . . . could cause the world price of oil to double." We regret any confusion this may have caused our readers.

George Horwich
David Leo Weimer

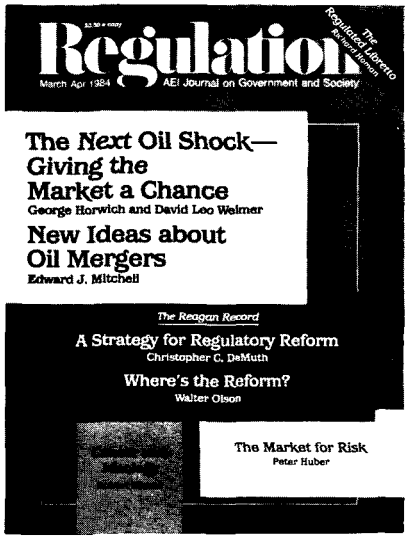
Rail and Truck Reform: Assessing the Record

TO THE EDITOR:

Thomas Gale Moore claims kudos for having predicted the benefits of recent truck and rail deregulation ("Rail and Truck Reform—The Record So Far," *Regulation,* November/December 1983). No one, to my knowledge, is advocating a return to the regulation against which Moore railed many years ago. However, the results of deregulation are not quite as clearcut and universally positive as he suggests.

Moore's analysis relies on the voluntary replies he received when he conducted a survey of shippers. This survey notwithstanding, it serves no useful purpose to pretend that none of the members of the shipping public have been losers. Among the shippers who believe themselves ill-served by the deregulatory events of recent years are the National Small Shipments Traffic Conference and the Drug and Toilet Preparation Traffic Conference. In a joint statement (Ex Parte No. MC-172) they assert: "The three years since the passage of the Motor Carrier Act of 1980 (MCA) have witnessed changes in the regulation of the motor carrier industry that have been, for the most part, devastating to shippers of freight weighing less than 1,000 pounds."

As for the effect on the suppliers of transportation, two points need



to be made. First, the deregulatory movement promised to help, more than anyone else, the allegedly abused independent owner-operators. It seems to have missed this target, however. As Marshall Siegel, executive director of the Independent Truck Owner-Operator's Association, stated in his prepared statement to the House Subcommittee on Surface Transportation on October 25, 1983: "From approximately 300,000 owner-operators in 1979, the number has decreased to approximately 100,000. This drop in the number of owner-operators can only be described as an unmitigated disaster."

The second point is that at least one important group, the general freight common carriers, has taken a much worse beating than Moore indicates. Dr. Irwin Silberman told the same subcommittee that, according to Value Line, this industry group's return on equity dropped from 14.3 percent in 1978 to 9.6 percent in 1982.

I will grant that some groups have benefited from deregulation, but we should not delude ourselves into thinking the millennium has arrived. There are problems that need to be resolved, not ignored, at every perilous step along this uncertain route.

Dabney T. Waring, Jr.,
Motor Common Carrier Associations

THOMAS GALE MOORE responds:

Waring says that "the results of deregulation are not quite as clearcut and universally positive as [I] suggest." My article was intended to indicate the overall impact of rail and motor regulatory reform, not to suggest that all participants, or even all shippers, benefited.

The impact of deregulation on owner-operators is confounded by other things that were going on at the same time. Fuel prices rose sharply from early 1979 through 1981; taxes on trucks were greatly increased in early 1983; a major recession, perhaps the worst in the post-war period, occurred during this period. It is unclear why deregulation should have harmed owner-operators, who were already unregulated. The drop in freight rates should have simply encouraged more freight traffic, increasing the demand for factors of production such as owner-operators. Moreover, deregulation was structured so as to encourage owner-operators to become licensed truckers; to what extent this happened is not yet known. Such incentives, added to the effects of higher fuel prices and taxes and the recession, are more likely to explain any decline in the number of owner-operators.

It is true that the return on equity of general freight common carriers had declined by about one-third by 1982. That figure is less than the comparable decline for the transportation industry as a whole, and represents the situation at the bottom of the recession, a point at which earnings were depressed throughout the economy.

While it may be true that some shippers are paying significantly more now to move their goods than they paid before deregulation, I have no data on these exceptional cases, nor does Waring give any. He cites the statement of the National Small Shipments Traffic Conference and the Drug and Toilet Preparation Traffic Conference as evidence that the changes have been "devastating to shippers of freight weighing less than 1,000 pounds." It is possible that these shippers may have been hurt, but it is also possible that the traffic conferences have included in this "devastating" rise in rates the sharp inflation that occurred during that period. The real question, of course, is what happened to those rates after adjusting for inflation. My information indicates that shippers of less-than-truckload lots have gained on average, although not as much as users of truckload service. None of this is to suggest that the millennium has arrived, only that shippers and eventually consumers should benefit from transportation decontrol. ■

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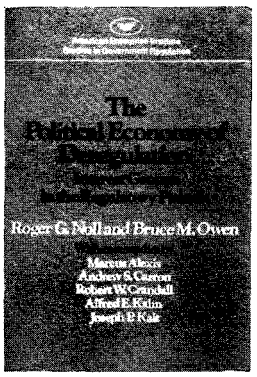

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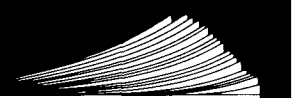

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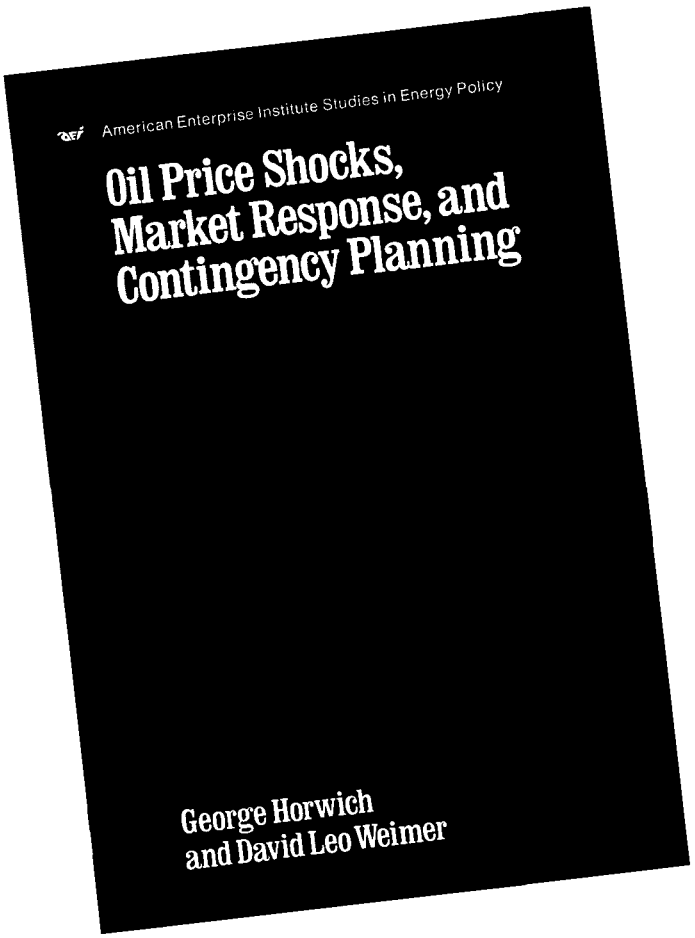
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